United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-1153

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

JACKSON D. LEONARD,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
MAY 23 1975
SECOND CIRCUIT

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Docket Entries.

Date	Proceedings
6-13-74	Filed indictment.
7-1-74	Deft. appears (Atty. Present). Deft. pleads Not Guilty, 10 days for motion. Bail fixed by court at $1,000 Personal Recognizance Bond. Bail limits extend World Wide. Deft. to notify U.S. Attorney by letter when he is leaving the Country. Country he is going to, address he is staying at, and dates he will be out of the United States. Deft. ordered Fingerprinted and photographed. Ward, J.
7-1-74	Filed unsecured P.R.B. in the amount of $1,000.00 acknowledged by the Clerk.
7-8-74	Filed Notice of Appearance of Jacob P. Lefkowitz.
7-11-74	Filed Deft's. affirmation and notice of pre-trial motions for discovery and inspection, Brady material, dismiss the indictment, etc. ret. 8-16-74.
7-11-74	Filed Deft's memorandum of law in support of pre-trial motion dtd. 7-11-74.
7-26-74	Filed Govt's. notice of readiness for trial after 9-14-74.
8-29-74	Filed Memo Endorsed on deft's. motion dated 7-11-74. The motion is denied and granted as indicated. . . . Owen, J. (mailed notice)
9-3-74	Filed Govt's. bill of particulars.
9-3-74	Filed Govt's. affidavit in opposition to deft's. motion dated 7-11-74.
9-3-74	Filed Govt's. memorandum on pre-trial motions.
11-22-74	Trial set for January 6, 1974, at 10:00 A.M. . . . Owen, J.
12-5-74	Filed Govt's. affidavit & Order to Show Cause for enforcement of subpoena duces tecum dated 9-27-74 directed to the Leonard Process Co. Inc., ret. 11-22-74 . . . Owen, J.

Docket Entries.

Date	Proceedings
12-5-74	Filed Memo Endorsement on Order to Show Cause filed 12-5-74. Motion decided in accord with the minutes of 11-22-74. So Ordered. . . . Owen, J. (mailed notice).
1-14-75	Filed Judge Owen's notice to the appropriate Judicial Authority in London, England for the return of the material witness.
1-13-75	Deft. present w/atty. (John J. Tigue) for trial. Jury empanelled & sworn. Trial begun.
1-14-75	Trial continued.
1-15-75	Trial continued.
1-16-75	Trial continued.
1-17-75	Trial continued.
1-20-75	Trial continued.
1-21-75	Trial continued. Verdict guilty both counts. Presentence investigation ordered. Sentence date March 7, 1975 at 2:15 P.M. Deft. to surrender passport. Bail limits continental United States. . . . Owen, J.
1-22-75	Filed envelope containing Grand Jury Record. Sealed by Order of Court, to be opened by Court of Appeals only. . . . Owen, J. (placed in vault in Room 602).
1-22-75	Filed envelope sealed by order of Court, to be opened by Court of Appeals only. . . . Owen, J. (placed in vault in Room 602)
1-22-75	Filed envelope sealed by order of Court, to be opened by Court of Appeals only. . . .Owen, J. (placed in vault in Room 602)
2-3-75	Filed deft's. preliminary requests to charge.
2-3-75	Filed deft's. affidavit & notice of motion for leave to inspect affirmative vote and dismiss indictment.

Docket Entries.

Date	Proceedings
2-3-75	Filed Govt's. responsive affidavit in opposition to deft's. motion to dismiss the indictment.
2-3-75	Filed Govt's. affidavit by John Alleva.
2-3-75	Filed Govt's. affidavit by Joseph J. Tragna.
2-3-75	Filed Govt's. affidavit by Robert Schulman.
2-3-75	Filed Govt's. affidavit by Norman Levy.
2-3-75	Filed Govt's. affidavit by Bernard M. Singer.
2-3-75	Filed Govt's. memorandum of law.
2-3-75	Filed deft's. memorandum of law.
2-3-75	Filed Govt's. supplemental bill of particulars, dated 10-29-74.
2-3-75	Filed Govt's. supplemental bill of particulars, dated 11-20-74.
2-3-75	Filed Govt's. proposed examination of prospestive jurors.
2-3-75	Filed deft's. proposed examination of prospective jurors.
2-3-75	Filed deft's. supplemental requests to charge.
2-3-75	Filed Govt's. requests to charge.
1-7-75	Trial Adj. Until 1/13/75 @ 10:00 a.M. Owen J.
2-3-75	Filed deft's. memorandum of law requesting that rule of Campbell v. United States be enforced as to Govt. witnesses.
1-8-75	Count 3 of Indict. is Dismissed on motion of Govt. & consent of court. Owen J.
3-6-75	Filed Transcript of Record of Proceedings of Jan. 20, 1975
3-6-75	Filed Transcript of Record of Proceedings of Jan. 7, 8, 1975
3-6-75	Filed Transcript of Record of Proceedings of Jan. 13, 14, 15, 16, 1975

Docket Entries.

3-7-75 Filed Judgment & Commitment (Atty. Present) The Deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of Eighteen 18 Months on each of counts 1 and 2 to run CONCURRENTLY with each other. Pursuant to T.18 USC Sec 3651, the deft. will be confined to a jail type institution for a period of Three (3) Months. The Execution of the remainder of the sentence is SUSPENDED & the deft. is placed on UNSUPERVISED probation for a period of Fifteen (15) Months, to commence upon release from confinement. Deft. is fined the sum of $5,000.00 each counts 1 & 2, for a total fine of $10,000.00. Pursuant to T.28 USC 1918 the deft. shall pay the assessed costs of prosecution, the amount of which is to be determined by law. Sentence is STAYED pending appeal. Owen J

3-11-75 Issued Commitment.

3-10-75 Filed Deft's. affidavit & notice of motion for judgment of acquittal and a new trial, ret. 3-7-75. Motion disposed of in accordance with the minutes of March 7, 1975.

3-12-75 Filed affidavit of Arnold Reiner, dated 1-24-75.

3-12-75 Filed affidavit of Jerry Sussman, dated 1-27-75.

3-12-75 Filed affidavit of Mortimer Laski.

3-11-75 Filed transcript of record of proceedings dated 1-3-75.

3-11-75 Filed transcript of record of proceedings dated 1-21-75.

3-13-75 Filed deft's. notice of appeal from the final judgment entered on 3-7-75. Mailed notice to Jackson D. Leonard, 37 West 37th St. N.Y.C. & U.S. Attorney's Office.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By A. E. THOMPSON
Deputy Clerk

Indictment.

The Grand Jury charges:

On or about the 15th day of June, 1968, in the Southern District of New York, Jackson D. Leonard, the defendant, unlawfully, wilfully, and knowingly did make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1967, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, and which he did not believe to be true and correct as a material matter, to wit: the omission of $24,168.09 from his reported 1967 adjusted gross income of $259,051.97 before deductions.

(Title 26, United States Code Section 7206(1)).

COUNT TWO

The Grand Jury further charges:

On or about the 18th day of August, 1969, in the Southern District of New York, Jackson D. Leonard, the defendant, unlawfully, wilfully and knowingly did make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1968, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, and which he did not believe to be true and correct as to a material matter, to wit: the omission of $58,684.42 from his reported 1968 adjusted gross income of $134,276.00 before deductions.

(Title 26, United States Code, Section 7206(1)).

COUNT THREE

The Grand Jury further charges:

On or about the 1st day of May, 1970, in the Southern District of New York, Jackson D. Leonard, the defendant, unlawfully, wilfully and knowingly did, in a matter within the jurisdiction of a department and agency of the United States, to wit: an audit of the defendant's 1967 return by the Internal Revenue Service of the Treasury Department, make and use a false, fictitious and fraudulent statement and representation, and a false writing and document knowing the same to contain a false, fictitious, and fraudulent statement and entry, to wit: the omissions of payments received for a 10% fee to cover the costs of processing and handling subcontracts pursuant to section 3(e) of a contract between the defendant and Union Carbide Corporation made and entered into on February 20, 1967.

(Title 18, United States Code, Section 1001).

GERARD J. TREAM
FOREMAN

PAUL J. CURRAN
PAUL J. CURRAN
United States Attorney

Indictment.

JUL 1 1974

Deft appears (atty J. P. Lefkowitz appears) Deft pleads n/g. 10 days for motions. Case assigned to Owen, J. Bail fixed by Court at $1,000 P.P.B. Bail Courts extend World Wide. Deft to Notify U.S. atty by letter when he is leaving the Country. Country he is going to, adress he is staying at and dates he will be out of the United States. Deft to be F/P

M.R.
WARD, J.

Nov 22 1974—Trial set for Jan 6, 1974, at 10:00 A.M.

OWEN, J.
R

JAN 7 1975—Trial adj. until Jan 13th 1975 at 10:00 A.M.

OWEN, J. S

JAN 8, 1975—Count 3 of indict. is dism. on motion of Gov & consent of court.

S OWEN, J.

JAN 13 1975—Deft. present w/atty (John J. Tigue) for trial. Jury empanelled & so trial begun

OWEN, J.

JAN 14 1975—Trial Continued

JAN 15 1975—Trial Continued

JAN 16 1975—Trial Continued

JAN 17 1975—Trial Continued

JAN 20 1975—Trial Continued

JAN 21 1975—Trial continued—verdict—guilty both counts —P.S.I. ordered. Sentence date March 7, 1975 at 2:15 P.M. Deft. to surrender passport. Bail limits—continuing United States.

OWEN, J.
R

MAR 7 1975—Deft. present w/atty. Tigue for sentencing. Prison term of 18 mos. on each of counts 1 & 2 to run concurrently. Under title 18 USC Soc. 3651 Deft. is required to serve 3 mos. term & L.S.S. on BAL. Deft given (illegible) *unsupervised* for that balance. Sentence is stayed pending appeal. Fine on $5,000. on BA. count & cost of prosecution.

S OWEN, J.

A TRUE COPY
(Seal)
RAYMOND F. BURGHARDT, Clerk

By A. E. THOMPSON
Deputy Clerk

RAYMOND F. BURGHARDT, Clerk

By .....
Deputy Clerk

Defendant Jackson Leonard's Memorandum of Law in Support of Certain Pre-Trial Motions.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 559

UNITED STATES OF AMERICA,

—against—

JACKSON LEONARD,

Defendant.

POINT I

UNDER RULE 16 (a) (1) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE THE DEFENDANT IS ENTITLED TO INSPECT AND COPY OR PHOTOGRAPH ANY RELEVANT WRITTEN OR RECORDED STATEMENTS OR CONFESSIONS MADE BY THE DEFENDANT, OR COPIES THEREOF, WITHIN THE POSSESSION, CUSTODY OR CONTROL OF THE GOVERNMENT, THE EXISTENCE OF WHICH IS KNOWN, OR BY THE EXERCISE OF DUE DILIGENCE, MAY BECOME KNOWN TO THE ATTORNEY FOR THE GOVERNMENT.

As this learned Court is well aware, the rules for discovery and inspection under the Federal Rules of Criminal Procedure were greatly broadened and liberalized with the passing of the new Rule 16 of the Federal Rules of Criminal Procedure which are presently in effect.

The new Rule 16 gives the District Courts great discretionary powers in granting a defendant's motion to inspect various relevant written or recorded statements or confessions made by him which are in the possession, custody or control of the United States Government.

Defendant Jackson Leonard's Memorandum of Law.

This new rule is, in effect, a codification of the more liberal cases in the Federal Courts in criminal proceedings under the old Rules 16 and 17 (c) of the Federal Rules of Criminal Procedure.

The old Rule 17 (c) of the Federal Code of Criminal Procedure allowed the judge, on motion, to direct that books, papers, documents or objects designated in an ordinary subpoena duces tecum be produced at any time before trial and be subject to inspection by the defense. In *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 71 S. Ct. 675, 95 L. Ed. 879 (1951), the Supreme Court held that Rule 17 (c) might be utilized by the defense for pretrial inspection if the material were sought "in a good faith effort to obtain evidence" whether or not such material might have been obtained under Rule 16 of the Federal Code of Criminal Procedure.

The famous case of *United States* v. *Iozia,* 13 F.R.D. 335, (S.D.N.Y., 1952) set forth the criteria for the use of Rule 17 (c). If (a) documents were evidentiary and relevant, (b) they were not otherwise procurable by the defendant in advance of trial (c) the defendant could not properly prepare for trial without them (d) the trial might unreasonably be delayed by withholding disclosure until trial, and (e) the motion was made in good faith and not as a "fishing expedition", the rule was available as a basis for a pretrial discovery motion.

Although a majority of the decisions handed down prior to the new rules coming into effect had denied pretrial access to defendant's statements under Rule 17 (c) on the grounds that such statements were not considered to be "evidentiary" (see e.g. *United States* v. *Malizia,* 154 F. Supp. 511 (S.D.N.Y. 1957) and *United States* v. *Murray,* 297 F. 2d 812 (2nd Cir. 1962); the better cases following the more liberal trend started in *Bowman Dairy Co.* v. *United States, supra,* and *United States* v. *Iozia, supra.*

See, for example, the following cases; *United States* v. *Bryson,* 16 F.R.D. 431 (N.D. Cal. 1954); *United States* v. *Brockington,* 21 F.R.D. 104 (E.D. Va. 1957); *United States* v. *Berman,* 24 F.R.D. 26 (S.D.N.Y. 1959); *United States* v. *Garrison,* 168 F. Supp. 622 (E.D. Wis. 1958).

The old Rule 16 authorized the district judge on motion of the defendant after indictment, to order the United States Attorney to permit inspection of books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process if they were designated properly, were material to the defense preparation and the request was reasonable. *Discovery in Federal Criminal Cases,* 33 F.R.D. 47, 106. But a defendant's statements, recorded or written, were generally held to be undiscoverable under the old Rule 16. The leading case which took this viewpoint was *United States* v. *Murray, supra.* However, the viewpoint on the part of within defendant has been taken by the United States District Court for the Southern District of New York in a case decided after *Murray.*

In *United States* v. *Willis,* 33 FRD, 510 (S.D.N.Y. 1963), the Court stated the following:

> "The defendant also seeks a copy of his own statements, signed or unsigned, or any transcripts of any stenographic or recorded statements. Discovery and inspection by a defendant of his own statements under Rule 16 has been a matter of much controversy in this District. The matter was seemingly set at rest by our Court of Appeals in *United States* v. *Murray,* which held that a defendant's own statements were not discoverable under Rule 16. Absent any doctrinal trend, its authority would be conclusive. *However, since the Murray case was decided, a proposed amendment to Rule 16 by the Advisory Committee on Criminal Rules suggests not only a doctrinal trend, but a definite pur-*

> *pose to provide a defendant with his own statements.* Moreover the Supreme Court has on at least two occasions deemed it the 'better practice' to allow the defendant to obtain his own statements, if any is granted." (Emphasis supplied.)

It must be noted that the proposed amendment to Rule 16 spoken of in this case had been enacted into law to the very statute we are seeking discovery under in the instant case.

POINT II

UNDER RULE 16(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE THE DEFENDANTS ARE ENTITLED TO INSPECT AND COPY OR PHOTOGRAPH BOOKS, PAPERS, DOCUMENTS AND OTHER TANGIBLE OBJECTS NOW IN THE POSSESSION, CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT, UPON SHOWING THAT THE ITEMS ARE MATERIAL TO THE PREPARATION OF THE DEFENSE AND THE REQUEST IS REASONABLE.

Rule 16 (b) of the Federal Rules of Criminal Procedure, in its present form authorized the district judge, on motion of the defendant, to order the United States Attorney to permit inspection of books, papers, documents, tangible objects, etc. if such items are material to the preparation of the defendant's defense and the request is reasonable.

Since the items the defendant in the case at bar seeks to inspect are clearly all items which may be material to the proper preparation of his defense, defendant clearly comes within Rule 16 and this motion should be granted. See *United States* v. *O'Connor*, 237 F. 2d 466 (2nd Cir. 1956), the leading case in this circuit, which stated that old Rule 16, which was quite similar to the present Rule 16 (b), should be liberally interpreted so as to carry out its purpose of enabling the accused to meet the charges presented against him.

Defendant Jackson Leonard's Memorandum of Law.

POINT III

DEFENDANTS ARE ENTITLED TO A BILL OF PARTICULARS UNDER RULE 7(f) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IN ORDER TO CLARIFY THE INDICTMENT HEREIN AND TO PREVENT SURPRISE AND ENABLE HIM TO PREPARE A PROPER DEFENSE TO THE CHARGES MADE AGAINST HIM.

Under Rule 7(f) of the Federal Rules of Criminal Procedure, the defendant in a criminal case is entitled to seek additional information to clarify the indictment by way of a motion for a bill of particulars. The standard for granting a Rule 7(f) motion is whether such clarification is necessary to prevent surprises or possible double jeopardy, or if the particulars as requested are necessary to enable the defendant to prepare his defense. *Wong Tai* v. *United States,* 273 U.S. 77 (1927); *United States* v. *Brown,* C.A. N.Y. 1964, 335 F. 2d 170. One case has even gone so far as to hold that a bill of particulars in a criminal case is available to any defendant who desires more information than that given in the indictment. *Reid* v. *United States,* D.C. Ala. 1964, 233 F. Supp. 314.

Although many cases have held that a motion for a bill of particulars under Rule 7(f) is addressed to the Court's discretion (see, e.g. *Wong Tai* v. *United States, supra.*) the better rule is that it is the scope of a bill of particulars, that is, what particular facts of information are necessary to enable the defendant to prepare his defense to the charges of the indictment, and to avoid surprise in the trial of the case, and not the fact of whether the defendant is entitled to a bill of particulars or not, which should be the factor determined by the trial court in its discretion. *United States* v. *Solomon,* D.C. Ill, 1960, 26 F.R.D. 397.

The general trend today is clearly toward more liberal discovery rules. This is evidenced by the changes in Rule 7 (f) which among other things, eliminate the words "for

cause" from the first sentence of the present Rule 7(f). In *United States* v. *Acarino,* 270 F. Supp. 526 (E.D.N.Y. 1967), defendant's motion for a bill of particulars was granted where he sought "such details as the time, place and names of the persons from whom it is alleged that the defendant received and procured the drug." 270 F. Supp. at 527, Judge Weinstein stated:

> "The 1966 Amendment to subdivision (f) of Rule 7 eliminated the necessity to show 'cause' for the granting of the bill in order 'to encourage a more liberal attitude by the courts towards bills of particulars . . .' (Committee Note to 1966 Amendment). *id.*"

The forerunner of the new Rule 7(f) was the decision in the case of *United States* v. *Smith,* D.C. Mo., 1954, 16 F.R.D. 372, rendered by former United States Supreme Court Justice Charles E. Whittaker, when he was sitting as District Judge for the United States District Court for the Western District of Missouri in 1954. In that case, Judge Whittaker stated the following:

> "Certainly, the fact that an indictment or information conforms to the simple form suggested in the rules is no answer or defense to a motion for a bill of particulars under Rule 7 (f). Rule 7 (f) necessarily presupposes an indictment or information good against a motion to squash or a demurrer. Its proper office 'is to furnish to the defendant *further information* (emphasis by Court) respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial', and when necessary for those purposes, is to be granted even though it requires 'the furnishing of information which under other circumstances would not be required because evidentiary in nature', and an accused is entitled to this 'as of right' (emphasis supplied). *U.S.*

v. *U.S. Gypsum,* D.C. 37 F. Supp. 398, 402. To the same effect are *Singer* v. *U.S.,* 3 Cir., 58 F. 2d 74; *U.S.* v. *Allied Chemical & Dye Corp.,* D.C. 42 F. Supp. 425, 428; *Fontana* v. *U.S.,* 8 Cir. 262 F. 283."

It should also be noted that although the Government is generally not required to disclose any of its evidence in response to a motion for a bill of particulars by the defendant under Rule 7(f) a number of cases have held that the mere fact that certain of the information sought by such a motion may involve revelation of some of the Government's evidence is not fatal to the demand and such information must be given to the defendant where it is necessary to the preparation of his defense or where justice appears to require it. *United States* v. *Cimino,* D.C.N.Y. 1962, 31 F.R.D. 277; *United States* v. *Bentvena,* D.C.N.Y. 1960, 193 F. Supp. 485; *United States* v. *Smith, supra.*

Finally, it must be noted that the mere fact that the defendant may already have some or all of the information requested does not necessarily defeat his right to a bill of particulars under Rule 7(f), *United States* v. *Spur Knitting Mills, Inc.,* D.C.N.Y. 1960, 187 F. Supp. 653.

CONCLUSION

DEFENDANT'S MOTION SHOULD BE GRANTED IN ALL RESPECTS.

Respectfully submitted,

JACOB P. LEFKOWITZ
JACOB P. LEFKOWITZ
Attorney for Defendant
Jackson Leonard

Notice of Pre-Trial Motions.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of Robert A. Fried, Esq. of the office of Jacob P. Lefkowitz, the indictment previously filed herein and all of the proceedings had herein, the undersigned, on behalf of defendant Jackson Leonard, will move this Court at a Part or Term of the Court for Criminal motions at 9:30 o'clock in the forenoon of the 16th day of August, 1974 or as soon thereafter as counsel can be heard, before Hon. Richard Owen in Courtroom #1306 of the United States Courthouse, Foley Square, New York, New York, for the following pre-trial relief:

1. An order for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure, directing the Government to permit the defendant Jackson Leonard, to inspect, copy, photograph, or subject to scientific analysis:

a. Any and all written, oral or recorded confessions, admissions, or statements of the defendant Jackson Leonard and/or copies thereof, made to the United States Attorney, agents of the Federal Bureau of Investigation or any other Law enforcement officers, the existence of which is known or by the exercise of due diligence, may become known to the attorney for the Government.

b. Any and all documents, books, papers, records, tangible objects or copies thereof which were obtained from or belonging to the defendant, the existence of which is known or by the exercise of due diligence, may become known to the attorney for the Government.

c. Any and all documents, books, records or tangible objects which were obtained from any person by seizure or process, or copies thereof, which are relevant

or material to the case for the Government or the defense, the existence of which is known or by the exercise of due diligence, may become known to the attorney for the Government.

d. The detailed results of any examinations or analysis which has been conducted by representatives of the Government, or copies thereof, as to any of the above items and/or for the Government to produce representative samples of any of the above items, the existence of which is known or by the exercise of due diligence, may become known to the attorney for the Government, so that the defense may conduct independent examinations or analysis.

e. The names and addresses and statements of any and all witnesses known to the prosecutor.

f. The criminal records, if any, of each witness the Government intends to call at the trial.

g. Any notes, memoranda, and written statements made by any law enforcement agency during their surveillance of the defendant.

h. Full and complete transcripts of any news releases, press statements or conferences, held by the Federal Bureau of Investigation, the United States Attorney's Office or any other law enforcement agency in connection with the arrests of the defendant, and in connection with the instant indictment, the existence of which is known or may by the exercise of due diligence, become known to the Government.

2. An order directing the Government under the authority of *Brady* v. *Maryland*, 373 U.S. 83, to furnish defense counsel reasonably in advance of trial, any exculpatory evidence and/or any evidence favorable to the accused, the existence of which is known or by the exercise of due

diligence may become known to the attorney for the Government.

3. An order directing the Government to state whether any electronic eavesdropping or wiretapping was conducted in connection with any aspect of this case:

a. If electronic eavesdropping or wiretapping has been conducted an order directing the Government to furnish the defendant with copies of any court order and application for such orders, under which said electronic eavesdropping or wiretapping were authorized.

b. If electronic eavesdropping or wiretapping has been conducted, an order directing the Government to furnish to the defendant complete transcripts of any such recorded sounds or conversations.

c. If electronic eavesdropping or wiretapping has been conducted, an order directing the Government to permit the defendant to listen to and copy any such recorded sounds or conversations.

4. An order pursuant to Rule 7(f) F.R. Crim. P., directing the United States Attorney to serve upon defense counsel a complete Bill of Particulars including the following:

A—As to the First Count

1. State in what manner and by what method the Government arrived at the sum of $24,168.09 which is alleged to have been omitted from defendant's calendar year 1967 tax return.

2. If the above sum is alleged to have been recevied in the form of "kickbacks" state the exact times, dates, places, amounts and manner in which each such payment is alleged to have been made.

3. State by whom it is alleged each payment was made.

B—As to the Second Count

1. State in what manner and by what method the Government arrived at the sum of $58,684.42 which is alleged to have been omitted from defendant's calendar year 1968 tax return.

2. If the above sum is alleged to have been received in the form of "kickbacks" state the exact time, dates, places, amounts and manner in which each such payment is alleged to have been made.

3. State by whom it is alleged each such payment was made.

C—As to Count Three:

1. State the substance of the false, fictitious and fraudulent statement and representation that is alleged to have been made and used by this defendant.

2. Produce and provide for defendant a copy of the alleged false writing and document as is described within this Count.

D—

Whether any transmitting or recording, video or photographic devices were used by the Government or persons acting at its behest to monitor and/or record any conversation or transaction involving the defendant personally and with any other individual.

i. Whether the Government intends to introduce in to evidence any information relevant to the present prosecution obtained in the above manner.

ii. The substance of such conversation or information.

E—

A true copy of any and all grants of immunity given by any Grand Jury to any of the defendants herein or un-

known or other persons named in the indictment but not joined as defendants together with a statement by the prosecutor naming the statute or statutes pursuant to which such immunity was given if such citation is not contained within the verbiage used in the aforementioned grant.

5. (a) An order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, granting inspection of the Grand Jury minutes with respect to the instant indictment or in the alternative, that the Court, in camera inspect said Grand Jury minutes and upon the Court's said inspection, dismiss the indictment as against the defendant Jackson Leonard.

(b) Pursuant to Rule 7(c) of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution of the United States dismissing the instant indictment upon the grounds that the indictment is unconstitutionally vague and infirm on its face.

6. An order granting such further and additional relief as to this Court may seem just and proper.

Dated: New York, New York, July 9, 1974.

Yours, etc.,

JACOB P. LEFKOWITZ
Attorney for Defendant
Jackson Leonard

To: UNITED STATES ATTORNEY
PAUL J. CURRAN

Clerk, U. S. District Court
Southern District of New York
Foley Square
New York, New York

Endorsement.

MICROFILM

Aug 30 1974

The within motion is disposed of as follows: Items 1(a) and (b) are granted. Items 1(c) and (d) are denied except to the extent consented to by the government. Items 1(e), (f), (g) and (h) are denied. As to item 2, no disposition is made, the government being under the continuing obligation imposed by *Brady* v. *Maryland,* which exists irrespective of any Court order. Item 3 is granted.

The demand for a bill of particulars (item 4) is disposed of as follows: 4A-1 and 4B-1 are granted. 4A-2 and 3 and 4B-2 and 3 are denied. 4C is granted provided that the word "exact" is deleted from demand 4C-1. 4D is denied except to the extent granted in paragraph 3 of the motion for discovery, *supra.* 4E is denied.

Finally, the relief demanded under paragraphs 5(a) and (b) is denied.

SO ORDERED:

August 28, 1974.

RICHARD OWEN
U.S.D.J.

Affirmation of Robert A. Fried, in Support of Motion.

ROBERT A. FRIED, an attorney duly admitted to practice before this Court, affirms the following to be true under the penalties of perjury:

I am an attorney at law associated with Jacob P. Lefkowitz, attorney for defendant Jackson Leonard, and I make this affirmation in support of certain pre-trial motions enumerated in the attached notice of motion.

The defendant Jackson Leonard is named in a three-count indictment alleging two counts of violation of Title 26, United States Code 7206(1) and one count of violation of Title 18, United States Code § 1001. The defendant has entered a plea of not guilty to the entire indictment and is presently awaiting trial.

The motion with regard to statements, etc, in the Government's possession, exculpatory material and the existence of electronic eavesdropping calls upon the Government to search their files for the material requested and does not require an initial factual showing on the part of the defendant.

It is possible that the prosecutor has in its possession statements of witnesses made to law enforcement agents concerning the happenings and events relating to the commission of the alleged crimes, which are not known to the defendant or his counsel.

Witnesses are the property of neither the Government nor the defense. Both sides should have an equal opportunity to interview them.

In affirmant's estimation all of the items set forth in the attached notice of motion would contribute to the effective preparation of the defense.

Discovery of the requested information will avoid unnecessary delay of the trial, and will allow the defendant to prepare for the issues at the forthcoming trial.

As far as the demand for a bill of particulars, it is essential to the defense of this prosecution that the defendant

be informed of the particulars sought by this motion. The particulars sought with respect to the instant indictment are both necessary and essential to permit the defense of this action to be adequately prepared, and to enable the defendant to be reasonably apprised of the offenses charged.

The particulars sought are reasonable and proper in relation to the bare conclusory allegations which appear in the indictment herein.

The particulars are sought in good faith and not calculated to compel the Government to disclose its evidence in advance of trial.

On information and belief the information requested is solely within the knowledge and control of the United States Attorney and the same may not be obtained from any other source.

The defendant is entitled to know whether any evidence was seized or obtained through eavesdropping so that the appropriate motions can be made.

Without this information, the defendant is totally unable to prepare his defense.

The defendant, Jackson Leonard, seeks inspection of the Grand Jury minutes with respect to the instant indictment upon the grounds that no competent testimony was adduced tending to connect the defendant with the substantive crimes charged.

Legal support for the various motions herein is set forth in the accompanying memorandum of law.

WHEREFORE, your affirmant requests that this Court enter an order granting, in full, the relief requested by the defendant.

Dated: New York, New York, July 9, 1974.

ROBERT A. FRIED

Bill of Particulars.

The United States of America, as for its Bill of Particulars, alleges as follows:

1. The defendant knowingly and wilfully converted, by the encashment of the Treadwell Corporation instruments designated below, the total sums of $24,168.09, during 1967, and $58,684.42, during 1968. He did so by designedly refraining from depositing such sums in any bank accounts. Thus, no one checking any banking records, either at his office or at the bank, could discover the afore-mentioned sums. Next, when he displayed such false books and records to his accountant, he designedly refrained from revealing their false character. Such embezzlements are not dependent upon the ultimate uses to which such sums, or substitute sums, were put since, at least, all were of an indisputably personal character.

Date	*Check No.*	*Amount*
7/13/67	8500	$ 587.75
8/ 3/67	8765	$ 2,973.62
10/ 6/67	9151	$ 4,202.47
11/ 6/67	17021	$ 6,415.48
12/ 7/67	17509	$ 6,370.96
12/ 8/67	17537	$ 360.00
		$24,168.09

Bill of Particulars.

Date	*Check No.*	*Amount*
1/10/68	10066	$ 6,229.20
2/20/68	10715	$ 8,769.36
2/29/68	17939	$ 6,643.57
4/ 4/68	11237	$ 6,519.62
5/ 3/68	11569	$ 6,710.49
5/27/68	18769	$ 5,172.02
7/ 3/68	19102	$ 6,470.90
7/30/68	12341	$ 4,009.04
8/27/68	12671	$ 3,334.16
10/ 4/68	19600	$ 3,120.04
10/ 6/69	53399	$ 1,706.02
		$58,684.42

2. The indictment makes no allegation with regard to any kickback character of the unreported $82,852.51. Whether or not motivated as part of a "kickback" scheme, a scheme to defraud the Union Carbide Corporation and the Treadwell Corporation, a scheme to minimize his several alimony obligations, or simply a wilful evasion of taxes owed several taxing authorities, the defendant, nevertheless, wilfully failed to include such sum in his own returns as alleged in Counts One and Two.

Dated: New York, New York, July 25, 1974.

W. Cullen MacDonald
W. Cullen MacDonald
Assistant United States Attorney

To: Jacob P. Lefkowitz, Esq.
Counsel for Defendant, Leonard.

Affidavit of W. Cullen MacDonald, in Opposition to Motion.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

W. CULLEN MACDONALD, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the offices of Paul J. Curran, United States Attorney for the Southern District of New York, and, as such, I am familiar with the above-captioned matter. This affidavit is submitted in response to motions filed by the defendant for (1) an inspection of the grand jury minutes; (2) discovery and inspection; (3) a Bill of Particulars; (4) an order concerning wire tapping; (5) an order concerning immunity granted anyone including "any of the defendants (*sic.*) herein"; and, finally, (6) an order dismissing the indictment "[p]ursuant to Rule 7(c) of the Federal Rules of Civil Procedure and the Fifth and Sixth Amendments to the Constitution."

2. On June 13, 1974, Indictment 74 Cr. 599 was filed charging the defendant with falsifying his federal income tax returns for 1967 and 1968 in violation of Section 7206(1) of Title 25, United States Code. Additionally, a third count charges false statements to the IRS auditor in violation of Section 1001 of Title 18, United States Code.

THE MOTION TO INSPECT THE GRAND JURY MINUTES

3. The Government opposes the motions to (1) inspect the Grand Jury minutes and, alternatively, (2) upon such inspection to "dismiss the indictment as against the defendant Jackson Leonard" (Paragraph 5(a)) for the reasons stated in the accompanying memorandum.

Affidavit of W. Cullen MacDonald.

THE MOTIONS FOR DISCOVERY AND INSPECTION

4. The Government consents to the production and inspection, during reasonable business hours at the offices of the United States Attorney, of the originals of all written and recorded statements and confessions made by the defendant, and copies thereof, pursuant to Rule 16(a)(1). Moreover, and subject to the defendant's agreement as outlined in paragraph 5 below, the Government consents to Discovery and Inspection of such of the defendant's oral statements as are contained in any memorandum report by a United States Attorney, agent of the Federal Bureau of Investigation and any other Law enforcement officer which purports "to produce the exact words used by" him (*United States* v. *Armantrout,* 278 F. Supp. 517, 518 (S.N.D.Y. 1968)). In an other respects, the Government objects on the basis that the defendant is not entitled, under the controlling authorities contained in the Government's accompanying memorandum, to the discovery sought.

5. The Government consents, subject to the defendant agreeing to the entry of a reciprocal order of equal scope, to the production and inspection, during reasonable business hours at the offices of the United States Attorney, of (a) the results and reports of physical and mental examinations and of scientific tests and experiments made in connection with this case and (b) all books, papers, documents, photographs, tangible objects, and copies and portions thereof, which are intended for use as evidence in chief at the trial. In all other respects, the Government objects on the basis that the defendant is not entitled, under the controlling authorities contained in the Government's accompanying memorandum, to the discovery sought.

Affidavit of W. Cullen MacDonald.

6. The Government acknowledges its obligation of disclosure under *Brady* v. *Maryland,* 373 U.S. 83 (1963) and consents thereto.

7. No electronic eavesdropping or wire tapping was conducted in connection with any aspect of this case. Nor were any transmitting, video tape or photographic devices used to monitor and/or record any conversation or transaction involving the defendant personally.

THE MOTION FOR A BILL OF PARTICULARS

8. The Government consents to furnishing a Bill of Particulars setting forth the particulars requested in Paragraphs 4(A) and 4(B). In all other respects, the Government objects on the basis that the defendant is not entitled, under the controlling authorities contained in the Government's accompanying memorandum, to the particulars sought.

(Sworn to by W. Cullen MacDonald, July 25, 1974.)

Affidavit of Robert Schulman.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK

ROBERT SCHULMAN, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by Robert Schulman, January, 1975.)

Affidavit of Joseph J. Tragna.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JOSEPH J. TRAGNA, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by Joseph J. Tragna, January, 1975.)

Affidavit of Bernard M. Singer.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

BERNARD M. SINGER, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of the circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by Bernard M. Singer, January, 1975.)

Affidavit of John Alleva.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JOHN ALLEVA, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by John Alleva, January, 1975.)

Affidavit of Norman Levy.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK }

NORMAN LEVY, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of the circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by Norman Levy, January, 1975.)

Affidavit of W. Cullen MacDonald.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

W. CULLEN MACDONALD, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and am assigned to and responsible for the above-captioned matter.

2. This affidavit is submitted in opposition to the defendant's motion to dismiss the indictment herein because of allegedly perjurious testimony before the Grand Jury, and in support of the Government's position (1) that no such testimony was presented, (2) that the testimony concerning the defendant's false statements to the I.R.S. was properly considered by the Grand Jury irrespective of the dates on which such false statements were made since relevant to all three counts of the indictment, (3) that the factual matrix set forth in the moving affidavit is erroneous in several material aspects, and, in any event, (4) that an *in camera* inspection of the Grand Jury testimony and a comparison of it with the deposition testimony of Mortimer Laski, discloses that *United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974) is wholly inapplicable.

3. Prior to November 22, 1974, I had advised both Robert Fried, Esq., Jacob F. Lefkowitz, Esq, and John J. Tigue, Jr., Esq. that the trial would probably proceed as to Counts One and Two only because it then appeared as if the evidence might not be able to adequately establish that the false respresentations occurred within the statutory period. I did not specify any of the proof underlying that judgment. Neither them, nor at any time thereafter, did I make any

representation "that the Revenue Agent who testified in the Grand Jury inaccurately stated the date upon which the contract was produced and that, in fact, the contract was exhibited to the Agent in May or June of *1969*" (Supporting Affidavit, pg. 3 ¶ 3). Within the last two weeks, I do recall having been asked by Leonard's counsel as to the currency of the prior representation. I also recall being asked at about the same time, if such a judgment necessarily had to include *Brady* material. In my responses, I do not recall having gone any further than a generalized reference to a refreshed-unrefreshed recollection as having given rise to the statute of limitations problem. Specifically, I do not recall having referred to or otherwise described the testimony before the Grand Jury in any way. Finally, when Mr. Tigue, on December 31, 1974, advised that the current motion was being made and of its bases, I do recall asking him if it made any difference to the merits if Laski had not testified in the Grand Jury and his response that it did not.

4. Submitted herewith to the Court for *in camera* inspection is a copy of the Grand Jury presentation in this case. Additionally, a copy of the deposition of Mortimer Laski is also herewith submitted to establish the accuracy and fairness of the Grand Jury presentation in light of the circumstances there clearly disclosed, and any event, the wide difference between it and the perjurious presentation condemned in *United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974).

WHEREFORE, for the foregoing reasons, the Government respectfully requests that the motion be denied in all respects.

(Sworn to by W. Cullen MacDonald, Assistant United States Attorney, January 6, 1975.)

Supplemental Bill of Particulars.

The United States of America, as and for its Bill of Particulars, alleges as follows:

1.

Date	*Check No.*	*Amount*
9/15/67	9064	$3,257.81

Dated: New York, New York, November 20, 1974.

W. CULLEN MACDONALD
Assistant United States Attorney

To: JACOB P. LEFKOWITZ, Esq.

Supplemental Bill of Particulars.

The United States of America, as and for its Supplemental Bill of Particulars, alleges as follows:

1. In substance, the defendant falsely represented that section 3(e) of a contract between himself and Union Carbide Corporation, dated February 20, 1967, had thereafter been cancelled by the mutual agreement of the parties and, accordingly, no payments were ever made or received thereunder. Furthermore, the defendant falsely affirmed that an altered and false version of such contract, wherein section 3(e) bore handwritten indications that it had been deleted, was the true and complete agreement between the parties.

Dated: New York, New York, October 29, 1974.

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By: W. CULLEN MACDONALD
W. Cullen MacDonald
Assistant United States Attorney
United States Courthouse

To: JACOB P. LEFKOWITZ, Esq.

Notice of Motion for Leave to Inspect Affirmative Vote and Dismiss Indictment.

SIR:

PLEASE TAKE NOTICE that upon the indictment herein the undersigned will move this Court before the Hon. Richard Owen, U.S.D.J., in the United States Court House for the Southern District of New York, Foley Square, New York, N. Y. at a time and place designated by the Court, for an order dismissing the indictment pursuant to the Due Process Clause of the Constitution and for an order permitting the defendant an opportunity to inspect the affirmative vote pursuant to Rule 6(f) of the Federal Rules of Criminal Procedure.

Dated: December 31, 1974, New York, New York.

Yours, etc.,

KOSTELANETZ & RITHOLZ
Attorneys for Defendant

By ARTHUR BROOKS
A Member of the Firm

To: HON. PAUL J. CURRAN
United States Attorney
Southern District of New York

Affidavit of John J. Tigue, Jr.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN J. TIGUE, JR., being duly sworn, deposes and says:

1. I am associated with the firm of Kostelanetz & Ritholz, attorneys for the defendant Jackson D. Leonard. This affidavit is submitted in support of the defendant's motion to dismiss the indictment herein pursuant to the Due Process Clause of the Fifth Amendment of the Constitution of the United States and to inspect the Affirmative Vote pursuant to Rule 6(f) of the Federal Rules of Criminal Procedure.

2. On June 13, 1974 the Grand Jury returned an indictment charging the defendant with two counts of filing a false personal income tax return for 1967 and 1968 in violation of Title 26 Section 7206(1). Count Three of the indictment charges a violation of Title 18 Section 1001 alleging the submission to the Internal Revenue Service of a false document, namely a contract. The essence of the government's case is that the defendant had a contract with Union Carbide Corporation ("U.C.C.") to construct a chemical plant during the years 1967 and 1968. Pursuant to that contract the defendant was to receive fixed payments in the amount of $750,000. In addition, the defendant had a right to receive an additional fee in the amount of ten percent of the total engineering costs at the plant. The government's claim in essence is that these ten percent fees were made in the form of check payments which the defendant cashed and failed to include these amounts in his tax returns.

The government will claim that during the course of an I.R.S. audit of the defendant's tax returns, a copy of the U.C.C. contract was exhibited to the auditing agent. The government will claim that two lines in the contract relat-

ing to the ten percent payments were lined out by the defendant for the purpose of concealing the receipt of the ten percent payments and their omission from his tax returns. The government has subpoenaed this contract from defendant and it is the subject of a related motion by the government to enforce that subpoena. The U.C.C. contract is the central document in this case and the government will argue the lined out contract is powerful evidence in establishing its charge of willful false statements on defendant's tax returns.

3. Approximately one week ago, I asked W. Cullen MacDonald, the Assistant United States Attorney in charge of this case, about the status of Count Three in the indictment. I indicated to Mr. MacDonald that our discussion on this matter was clearly "on the record". Mr. MacDonald represented that Count Three of the indictment would be dismissed at the beginning of the trial on the government's own motion. I asked Mr. MacDonald why. He stated the Count was barred by the Statute of Limitations. I replied that the Count was not barred on the face of the indictment as the allegation in the indictment stated that the contract was given to the I.R.S. in May of *1970*. Mr. MacDonald indicated that the Revenue Agent who testified in the Grand Jury inaccurately stated the date upon which the contract was produced and that, in fact, the contract was exhibited to the Agent in May or June of *1969*.

4. The significance of the date of its production is of overwhelming importance because the defendant's income tax return for 1968 was not filed until August 1969, at least two months *after* the U.C.C. contract was alleged to have been exhibited to the Agent. It is self-evident that the defendant would not produce a contract which the Internal Revenue Service Agent was challenging in May or June of 1969 and two months thereafter file a false tax re-

turn for the year 1968 omitting therefrom the very income which is called for in the contract and which the I.R.S. is analysing.

5. It is clear that the Grand Jury would not have indicted the defendant for Count Three of the indictment had it known the true facts. It is also likely that the Grand Jury would not have indicted the defendant for Count Two of the indictment if they had known the true facts relating to the production of the U.C.C. contract. Where the charge in the indictment, as it is here (26 U.S.C. § 7206(1)), depends upon what the defendant *subjectively believed or did not believe,* the materiality of the production of the alleged altered contract is clearly established. Obviously, the Assistant U. S. Attorney is aware of the inaccurate Grand Jury testimony by the I.R.S. Agent. It is, therefore, submitted that the Court should dismiss the indictment or the government should *noli prosequi* the indictment, pursuant to *United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974).

6. I do not have in my possession the Grand Jury testimony of the Agent in question and, whether his testimony was perjured or inadvertent, it is not possible to state at this moment. Therefore, if the government does not voluntarily file a *noli prosequi* or if the Court does not dismiss the indictment, I respectfully request an opportunity to examine all the testimony presented to the Grand Jury, particularly that of the government agents who testified regarding the crucial contract. Mr. MacDonald informed me that the case was presented to the June "regular" Grand Jury. I am unaware of whether or not the Grand Jury is still in existence.

7. If the Grand Jury would certainly not have voted Count Three of the indictment and, perhaps, would not have voted Count Two of the indictment, it is unlikely that they

would have voted Count One of the indictment, particularly in view of the Internal Revenue Service firm policy of not prosecuting "one year cases". In any case, the false testimony, whether intentional or inadvertent, "has poisoned the water in this resevoir, and the resevoir cannot be cleansed without first draining it of all impurity". *United States* v. *Basurto,* 497 F.2d at 786.

The test used in *Basurto* is that the indictment must be dismissed if the Grand Jury *might* not have indicted without the perjured testimony. Indeed, this case is *a fortiori* to *Basurto* in that the Grand Jury in that case was not informed of the consequences of the testimony, i.e. a five year mandatory minimum sentence for the defendant. Here the alleged altered contract goes to the heart of the government's claim and proof and not to a sentence which can be imposed upon conviction. Furthermore, the testimony in this case was undoubtedly recorded by the Grand Jury stenographer which was not the case in *Basurto.* The Court in *Basurto* held:

> "We hold that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached." 497 F.2d at 785.

The Court quoted *Napue* v. *Illinois,* 360 U.S. 264 (1959), which reaffirmed the principle that a conviction obtained through the use of false evidence known by the prosecutor cannot stand. In this case, the false testimony (be it intentional or inadvertent makes no difference) was given by an employee of the United States Government. Given the present position of not having the Grand Jury testimony, I make no comment on the motive for the inaccurate testimony here other than to state that I am informed that

the defendant has been audited for virtually every year for the last twenty years, he has litigated with the Internal Revenue Service in the Tax Court returns for four years, and he has had stormy relationships with at least one of the Revenue Agents in this very case. It may be that the same agent who testified "inaccurately" in the Grand Jury is this same agent.

8. This affidavit is submitted in support of an order pursuant to Rule 6(f) of the Federal Rules of Criminal Procedure to direct the Chief Clerk of the United States District Court for the Southern District of New York to unseal the Affirmative Vote of the Grand Jury in this case and to allow its inspection. I have been informed by Mr. Frank Costello (formerly Chief Criminal Clerk), Clerk to the Hon. Edward Weinfeld, District Judge for the Southern District of New York, that the Affirmative Vote in 74 Cr. 599 has been sealed and placed in a vault in Room 505 of the United States District Court for the Southern District of New York.

It is respectfully submitted the indictment be dismissed.

(Sworn to by John J. Tigue, Jr., December 31, 1974.)

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Defendant's Preliminary Requests to Charge.

REQUEST NO. 1

Function of Judge and Jury

My exclusive function at this point is to instruct you as to the law that applies in this case. It is your duty to accept the law as I state it to you and to apply it to the facts as found by you from the evidence.

Just as you are not permitted to encroach on my function in giving instructions on the law, I must not and will not encroach on your function as the sole judges of the facts.

You are to approach your duties in a complete attitude of fairness and impartiality and to appraise the evidence calmly and deliberately, and without the slightest trace of sympathy, bias, or prejudice for or against the prosecution or the defendants as parties to this litigation.

REQUEST NO. 2

Explanation of the Term "Indictment"

This case must be decided within the framework of the charges made against the defendants, as contained in the indictment. The indictment is merely a written accusation by a grand jury which acted upon only that evidence which the prosecution chose to adduce before it, and it is not evidence of any kind against the defendants. None of the defendants nor their attorneys were present before the grand jury; nor were they afforded an opportunity to present evidence on the defendants' behalf. The indictment neither creates any adverse presumption nor permits any inference or suspicion of guilt, nor does it detract in any degree from the presumption of innocence with which the law surrounds the defendants. You will not give any weight whatever to the fact that an indictment has been filed against the defendants.

Defendant's Preliminary Requests to Charge.

REQUEST NO. 3

Prosecution and Defense Are Equals in Court

The fact that this indictment is brought in the name of the United States of America does not entitle the prosecution to any greater consideration than any other litigant would get, but, by the same token, it is entitled to no less consideration. The issues in this case must be decided on the evidence and on the law. All parties, prosecution and defendants, stand alike as equals before the bar of justice.

REQUEST NO. 4

Explanation of the Term "Count"

Jackson Leonard is on trial upon an indictment which contains two counts. A count is simply a charge or accusation. He is not on trial for any act or conduct not alleged in these counts. Mr. Leonard has entered a plea of not guilty and in denying the charges has put into issue the essential elements of each count of the indictment.

REQUEST NO. 5

Not a Civil Case

There is a distinction to be made between civil and criminal liability under the tax laws.

Civil liability, if assessed, may result in a payment of taxes. Criminal liability may result in imprisonment or a fine, or both.

This is a criminal case. The defendant is charged with the commission of crimes under the tax law. Your verdict here will not determine whether the defendant or his corporation owe any taxes. That question may be resolved in another forum, no matter what your verdict.

Defendant's Preliminary Requests to Charge.

REQUEST NO. 6

Burden of Proof and Presumption of Innocence

Under our law, all persons charged with the commission of crime are presumed to be innocent until their guilt has been established by competent evidence beyond a reasonable doubt. You are thus to begin your consideration of this case with the presumption that the defendant, although accused, is innocent. When a person is charged with the commission of a crime, he is not bound to prove that he did not commit that crime, but the prosecution must prove beyond a reasonable doubt that he did commit it. The defendant here is entitled to rest upon the presumption of innocence in his favor, and the burden of overcoming this presumption of innocence rests upon the prosecution. In other words, the defendant is under no duty to establish his innocence in order to obtain an acquittal. He is presumed to be innocent of the accusations contained in the indictment. The burden of establishing the guilt of a defendant beyond a reasonable doubt rests upon the prosecution, and this burden never shifts throughout the entire trial. I want to emphasize that this presumption is not an idle phrase and is not to be taken lightly by the jury. It is an important right belonging to every defendant accused of crime. You are bound to entertain that presumption conscientiously without any mental reservation whatsoever and to give the defendant the full benefit of that presumption. The presumption was in the defendant's favor at the start of the trial; it is in his favor as I address you right now and it remains in his favor during your deliberations in the jury room. It is removed only if and when all twelve of you are satisfied beyond a reasonable doubt of the guilt of the particular defendant of the offenses charged. *United States* v. *Farina,* 184 F.2d 18, 20 (2d Cir. 1950), cert. den.,

340 U.S. 875, rehearing den. 341 U.S. 928; *Perez* v. *United States,* 297 F.2d 12, 16 (5th Cir. 1961); *United States* v. *Alaimo,* 297 F.2d 604, 606 (3d Cir. 1961); cert. den. 369 U.S. 817; *McAffee* v. *United States,* 105 F.2d 21, 30 (D.C. Cir. 1939); *United States* v. *Fruehauf,* Cr. 159-138 (SMP 3268-3269).

REQUEST NO. 7

Wilfulness

You will observe that in each Count of the indictment, one of the essential elements of the offense charged therein, which the prosecution must prove, is that the defendants *wilfully* performed the acts set forth. Generally speaking, a wilful act is a deliberate and intentional act, an act done knowingly, done with bad purpose, evil motive and a black heart. Wilfulness, as used in the statute forming the basis for the offense charged in this case, means more than doing something deliberately. It means doing something with a bad purpose and that something is to attempt to deceive the Government.

The offenses in this case are not committed unless you find that the defendant had actual knowledge of the existence of the true facts and law and deliberately and intentionally attempted to avoid their obligations with respect thereto.

An act is not done knowingly and wilfully if it is in fact done, but done as a result of some innocent reason. It is not done knowingly and wilfully if all that is shown is that the defendants were ignorant, stupid, careless, negligent, or even grossly negligent. A defendant could not knowingly and wilfully violate a law if what is shown is that he made errors of law or of fact. A defendant could not knowingly and wilfully violate the law if the acts allegedly committed were actually performed by him out

of ignorance of the law or true facts, or if he was mistaken with respect to the law or true facts. Mr. Leonard could not knowingly and wilfully violate the law if the acts allegedly committed were done under an honest belief that his return was accurate as to the adjusted gross income. To put it another way, the prosecution is required to prove that the defendant acted with a specific criminal intent, that he acted in bad faith and with a deliberate purpose to disobey the law. If you find that the element of wilfulness and knowledge as I have defined those terms, was lacking on the part of any defendant, you must acquit him. *Bateman* v. *United States,* 212 F.2d 61, 69 (9th Cir. 1954); *Chow Bing Kew* v. *United States,* 248 F.2d 466, 471 (9th Cir. 1957), cert. den. 355 U.S. 889; *United States* v. *Murdock,* 290 U.S. 389, 394 78 L.Ed. 381 (1933); *United States* v. *Schneiderman,* 106 F. Supp. 906, 930 (Cal. 1952); *United States* v. *Gaunt,* D. Mass. (1949); aff'd 184 F. 2d 284 (1st Cir. 1950), cert. den. 340 U.S. 917 (1951); *United States* v. *Litman,* 246 F.2d 206, 209 (3rd Cir. 1957); *United States* v. *Tadio,* 223 F.2d 759 (2d Cir. 1955), cert. den. 350 U.S. 874.

REQUEST NO. 8

Mere Understatement of Income

The requisite criminal intent to make a fraudulent and wilfully false statement on a tax return must be proven by independent evidence. It cannot be inferred from the mere understatement of income. *Holland* v. *United States,* 348 U.S. 121, 139 (1954).

Thus, even if you find an understatement of income in the tax returns in issue you must acquit the defendant if you find that he did not have the intent to cheat the government. *United States* v. *Koppelman,* 61 F. Supp. 1007, 1008 (D.C. Pa.).

Defendant's Preliminary Requests to Charge.

REQUEST NO. 9

Ignorance of the Law

Errors of law may not be counted against the defendant in this proceeding. A defendant is to be found guilty only if he had a wicked intent and was deliberately trying to deceive the government. The fact that a man makes an error of law, even an admitted error of law, does not warrant a conviction under this statute. Evidence that the defendant acted or failed to act because of ignorance or error of law is to be considered by you as evidence of an absence of wilfulness or criminal intent and if such evidence is believed, you must acquit the defendant.

See Jury Instructions of Judge William C. Mathes (S.D. Calif.) 27 F.R.D. 39, 174 (1961).

Spies v. *United States*, 317 U.S. 492 (1943);
Wardlaw v. *United States*, 203 F. 2d 884, 885 (5th Cir. 1953).
Charge by Judge Thomas Murphy in *United States* v. *Mattisen*, Cr. 155-144 (S.D.N.Y. 1958) Trans. pp. 361-62; *United States* v. *Gaunt* (D. Mass. 1949) aff'd 184 F. 2d 284 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951).

REQUEST NO. 10

Reasonable Doubt

In order for you to find Mr. Leonard guilty of the offenses charged in the indictment, there must be such proof as satisfies your reason as intelligent people beyond any reasonable doubt that he is guilty as charged. Now, what is a reasonable doubt? A reasonable doubt means a doubt founded on reason arising from the evidence, or lack of evidence, in the case. The kind of doubt I am referring to

is a doubt based upon reason and common sense arising from the state of the evidence—a doubt which each of you in the more serious and important affairs of your lives would make you hesitate to act. *Holland* v. *United States,* 348 U.S. 121, 140, 99 L.Ed. 150, 167 (1954). In other words, proof beyond a reasonable doubt is only established if the evidence is such as you would be willing to rely and act upon it in the very most important of your own affairs. The defendant is not to be convicted on mere suspicion, conjecture or possibility. A reasonable doubt exists when after careful and impartial consideration of all evidence, the jurors individually and collectively do not feel convinced to a moral certainty that a defendant is guilty of the crime charged. *United States* v. *Schneiderman,* 106 F. Supp. 906, 927, 928 (D. Calif. 1952).

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove a defendant guilty beyond a reasonable doubt of every essential element of the crime charged, a reasonable doubt would arise upon failure of the prosecution to establish such proof. A reasonable doubt may also arise from the evidence brought out on cross-examination of witnesses for the prosecution. As I have previously instructed you, the law does not impose upon the defendant the duty of producing any evidence.

If, after a fair and impartial consideration of all the evidence, you are not satisfied of the guilt of Mr. Leonard, or you do not have an abiding conviction of his guilt which amounts to a moral certainty, it is your duty to acquit that defendant. *United States* v. *Pape,* 144 F.2d 778, 781 (2d Cir. 1944), cert. den. 323 U.S. 752; *United States* v. *Spagnuolo,* 168 F.2d 768, 770 (2d Cir. 1948), cert. den. 335 U.S. 824.

Defendant's Preliminary Requests to Charge.

REQUEST NO. 11

Inferences

During the trial, you have listened to the testimony of witnesses; you have seen certain exhibits in evidence and have had the content of others read to you. I now wish to instruct you that, as jurors in this case, you are permitted to draw such inferences from such evidence as your common sense and experiences dictate. In other words, you may draw inferences—reasonable deductions and conclusions from proven facts. Where different or conflicting inferences reasonably may be drawn from the evidence, it is for you, the trier of the facts, to determine which inferences shall be drawn. *United States* v. *Robertson,* 298 F. 2d 739, 741 (2d Cir. 1962); *Brown* v. *United States,* 237 F. 2d 281, 283 (8th Cir. 1956); *United States* v. *Masiello,* 235 F. 2d 279, 285 (2nd Cir. 1956); cert. den. *sub nom.: Steckel* v. *United States,* 352 U.S. 882; *Gold Metal Process Co.* v. *McLouth Steel Corp.,* 126 F. 2d 185, 188 (6th Cir. 1942).

REQUEST NO. 12

Presumptions

A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary, a presumption continues in effect until overcome or outweighed, the jury is bound to find in accordance with the presumption.

I have previously made reference to and explained the presumption of innocence that exists in favor of the defendants. I now wish to instruct you concerning another presumption. Unless and until outweighed by evidence to the contrary, the law presumes that official duties have been regularly and properly performed; that private trans-

actions have been fair and regular; that the ordinary course of business has been followed; and that the law has been obeyed. *United States* v. *Schneiderman,* 106 F.Supp. 906, 928 (D.C. Cal. 1952); Devitt & Blackman, *Federal Jury Practice and Instructions,* Section 11.05.

REQUEST NO. 13

Evidence Susceptible of Dual Interpretations

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of a defendant, and the other to his innocence, it is your duty, under the law, to adopt the interpretation which points to defendant's innocence and to reject the one that points to his guilt. In other words, where the proof adduced by the prosecution is as consistent with innocence as with guilt, the prosecution has failed to make out a case. *United States* v. *Lowery,* Cr. 35, 887 (N.D. Cal. 1958), Transcript p. 6; *United States* v. *Broverman,* Cr. 158-174 (SDNY) SMP 1656, 1657.

REQUEST NO. 14

Conflicting Evidence

You have seen the witnesses and have heard them testify. It is your duty, as jurors, to reconcile all the testimony of all the witnesses both on direct and on cross-examination with all of the facts, if you are able to. If, after weighing the matter carefully, viewing it in the light of your best judgment as reasonable men and women, you find that you are unable to reconcile a conflict in the testimony upon any reasonable theory consistent with an intention

on the part of each of the witnesses to testify truthfully, then it is for you to say who has been mistaken, who has told the truth, who has testified falsely, whom you will believe. In other words, it is for you to determine which testimony in conflict is most worthy of belief, and to disregard that which cannot be reasonably and fairly reconciled therewith.

Conflicting testimony in and of itself may be sufficient to raise a reasonable doubt and if you have such doubt as a result of a conflict in testimony, it is your duty to acquit the defendants.

Dillon, et al., v. *Evansville Refining Co., Inc.*, 127 F. 2d 13, 17 (7th Cir. 1942); *Hardware Mutual Ins. Co. of Minn.* v. *Hieb*, 146 F. 2d 447, 451 (8th Cir. 1945); *United States* v. *Broverman*, 158-174 (SDNY) SMP 1657, 1658.

REQUEST NO. 16

Government Employees

The mere fact that a witness is employed by the United States Government does not entitle such witness' testimony to more weight or credence than that of any other witness' testimony. You may judge the credibility of *all* witnesses, including Government employees, and consider their interest, if any, in determining the weight to be given to their testimony. Remember always that it is the quality of the evidence that counts.

REQUEST NO: 17

Credibility of Witnesses

You, the jury, are the sole judges of the credibility of the witnesses and of the weight which should be given to their testimony.

Defendant's Preliminary Requests to Charge.

In judging the credibility of a witness and in determining the weight to be given to his testimony, you may consider the witness' demeanor and manner while on the witness stand, the character of his testimony as being probable or improbable, the reasonableness of his testimony, patent omissions and discrepancies in his own testimony or between his testimony and that of other witnesses, whether his testimony has been contradicted by the testimony of other witnesses or by the exhibits, whether his testimony is consistent with the testimony of other witnesses and with the exhibits, and whether his story dovetailed in with the rest of the credible testimony in the case. *Young Ah Chor* v. *Dulles,* 270 F. 2d 338, 341 (9th Cir. 1959); *Hardware Mutual Ins. Co. of Minn.* v. *Hieb,* 146 F. 2d 447, 451 (8th Cir. 1945); *Fraser* v. *Williams,* 61 F. Supp. 763, 766 (Wisc. 1945); *Emanuel* v. *Kansas,* 127 F. 2d 175, 179 (8th Cir. 1942); *Weaver* v. *United States,* 111 F. 2d 603, 607 (8th Cir. 1940);

In your search for the truth you must also use your plain everyday common sense and experience in determining whether a witness has testified frankly, candidly and honestly. In other words, you act precisely as you would in your own affairs when called upon to reach or to make an important decision concerning the truthfulness of a statement made to you by another upon which you are asked to rely.

If you believe that any witness wilfully has testified to any material fact in his testimony, you are at liberty to disregard the whole or any part of that witness' testimony.

It is for you to decide how much weight, if any, is to be given to all or any part of the testimony of each witness.

Defendant's Preliminary Requests to Charge.

REQUEST NO. 18

CREDIBILITY OF OWN WITNESS

If a party to this action, either the Government or a defendant calls a witness in proof of his case, you may infer that the party calling the witness believes that the witness will testify truthfully both on direct examination and cross-examination. It may be said that the party calling a witness asserts the witness' credibility. See Richardson on Evidence, 9th Edition, § 520 (1964); 58 AM. Jur. § 792.

REQUEST NO. 19

ADMISSIONS

All evidence relating to any alleged verbal admission or alleged incriminating statement claimed to have been made by the defendant outside of Court should be considered with caution and weighed with great care. *Short* v. *United States,* 271 F. 2d 73, 79 (9th Cir. 1959), cert. den. 36 U.S. 948; *Stapleton* v. *United States,* 460 F. 2d 415, 419 (9th Cir. 1958).

Under no circumstances may you find a defendant guilty on the basis of his alleged statements made outside of this courtroom. Before you may consider any such alleged statements attributed to a defendant, there must be substantial independent evidence that the crime charged has been committed by them. *Opper* v. *United States,* 348 U.S. 84, 99 L. Ed. 101 (1954); *Gay* v. *United States,* 408 F. 2d 923 (5th Cir. 1969); *United States* v. *Marcus,* 401 F. 2d 563 (2nd Cir. 1968); *United States* v. *Chapman,* 168 F. 2d 997, 1001 (7th Cir. 1948).

Defendant's Preliminary Requests to Charge.

REQUEST NO. 20

Reputation Evidence

Mr. Leonard has introduced evidence of his good reputation for truth and veracity, honesty and integrity and as a law-abiding citizen in order to demonstrate that it is not probable that he, being possessed of these traits, would commit the offenses with which he is charged.

In a case such as this, where a defendant defends, in part, on the lack of knowing and wilful intent, his reputation is an extremely important element to be considered by you.

Evidence of good reputation is *substantive* evidence which must be considered by you along with all the other evidence in the case. Indeed, such evidence, alone, may be sufficient to raise a reasonable doubt as to the defendant's guilt, even though without it no such doubt would exist, and the other evidence in the case would be convincing.

Evidence that a defendant's reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, has not been discussed or, if discussed, those traits of the defendant's character have not been questioned, is sufficient to warrant an inference of good reputation as to those traits of character. *Michelson* v. *United States,* 335 U.S. 469, 93 L.E.d. 168 (1948); *United States* v. *Minieri,* 303 F. 2d 550, 554-555 (2nd Cir. 1962); *Federal Jury Practice and Instructions,* Mathes, p. 108 (1965).

Defendant's Preliminary Requests to Charge.

REQUEST NO. 21

RULINGS BY THE COURT

Nothing that I have said here or during the trial, no question which I have asked, no ruling that I have made, no statement in this charge, is intended in any way as an intimation of what determination of this case I believe you should make.

Remember that in your determination of the facts you rely upon your own recollection of the evidence. What I have said from time to time, or what I may say in this charge, or what counsel have said during the course of the trial or during their summation, is not to be taken in place of your own recollection of the facts or the evidence in this case.

Nor are you to take into account or consider in any respect the rulings made on various motions and objections by counsel. Counsel have the right, and indeed it is their duty to object, to the introduction into evidence of any testimony or exhibit offered by the opposing party. My rulings, therefore, related solely to matters of law with which you have no concern. You must disregard questions and answers to which objections were made and sustained. Similarly, if after a question was asked and an answer given, the answer was ordered stricken from the record, disregard the answer as well as the question.

You are further instructed that with respect to every situation where testimony has been stricken, the reason therefor is a matter of law which is of no official concern of yours and not for your consideration. Once stricken, such testimony must be disregarded and ignored and the reason for such striking, which is the legal basis for the Court's ruling, should not be discussed among you, nor should you speculate or guess with respect to the basis for such ruling.

Nor are you to draw any conclusions from the fact that the Court asked certain questions. This is solely to elicit facts.

REQUEST NO. 22

VERDICT OF JURY

As to each count in the indictment, you must render separate and unanimous verdicts as to guilty or not guilty. The fact that you may find Mr. Leonard guilty or not guilty as to one of the counts charged, should not control your verdict as to the other count. *United States* v. *Nichols,* 322 F.2d 681 (7th Cir. 1963), cert. den. 375 U.S. 967 (1964).

It is your duty as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without compromise to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You should not join in a majority view, of which you remain conscientiously unconvinced merely because you find yourself in the minority. You are not to yield simply because you find yourself outnumbered or outweighed. *Rhodes* v. *United States,* 282 F.2d 59, 62-63 (4th Cir. 1960), cert. den. 364 U.S. 912.

In order for a verdict of either guilty or not guilty to be found by you, it must be the unanimous verdict of all twelve jurors. Since guilt must be established beyond a reasonable doubt (a phrase which I have previously ex-

plained), all twelve jurors must be convinced beyond that doubt of such guilt. A verdict of guilty cannot be returned if only one of you steadfastly has a reasonable doubt. *Billeci* v. *United States,* 184 F.2d 394, 403 (D.C. Cir. 1950).

Remember at all times during your deliberations that Mr. Leonard is entitled to an acquittal if any reasonable doubt remains in your minds. Remember also that the question before you can never be: Will the government win or lose the case? The government always wins when justice is done, regardless of the verdict. *United States* v. *Schneiderman,* 106 F. Supp. 906, 940 (Ca. 1952).

REQUEST NO. 23

Confusion as to the Evidence Amounts to a Reasonable Doubt

It is the Government's burden to prove the guilt of a defendant beyond a reasonable doubt. If the proof introduced by the Government has left you confused as to what evidence applies to which count, the Government has failed to sustain its burden of proof and you are to find Mr. Leonard not guilty.

REQUEST NO. 24

Good Faith Belief of Accused

If Jackson Leonard in good faith believed that an income tax return, as prepared by his accountant and reviewed by his attorneys, truthfully reported the adjusted gross income of the taxpayer under the internal revenue laws, he cannot be guilty of wilfully signing and filing a false return. *Spies* v. *United States,* 317 U.S. 492 (1943).

Defendant's Preliminary Requests to Charge.

REQUEST NO. 25

Essential Elements of § 7206(1)

Four essential elements are required to be proved beyond a reasonable doubt in order to establish the offense charged in the indictment:

First: The filing and signing of a tax return;

Second: The tax return in issue contains or is verified by a written declaration that it is made under the penalties of perjury;

Third: The fact that the accused did not believe the return to be true and correct as to the adjusted gross income figure; and

Fourth: The doing of such act was wilful and with criminal intent.

As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

REQUEST NO. 26

Definition of Material Matter in § 7206

One of the elements of § 7206(1) is that the Government prove beyond a reasonable doubt that the tax returns in issue are false as to a "material matter". The law requires that to be a "material matter" the false statement relates either to a desire to save taxes or to some wrongful tax result. Therefore, even if you should find that the Government has proved beyond a reasonable doubt

that the tax returns for Jackson Leonard were false, you must acquit Mr. Leonard if you find that the falsehood was not material in that it did not affect the taxes of Jackson Leonard in a substantial manner. Furthermore, in determining whether any alleged falsehood is "material", or "wilful" on the part of the defendant, you may consider the fact that the Government received the same net dollar amount of taxes that it would have received if the alleged falsehood had not been made. *Hoover* v. *United States,* 358 F. 2d 87 (5th Cir. 1966); see also, Kostelanetz & Bender, *Criminal Aspects of Tax Fraud Cases,* p. 25 (A.L.I. Publication).

REQUEST NO. 27

Direct and Circumstantial Evidence

In this case, the Government offers direct and circumstantial evidence.

Direct evidence is evidence which results when a witness sees the commission of an act and testifies to what he saw, heard or discovered what he knew of his own knowledge—something which comes to him directly by virtue of his senses.

Circumstantial evidence is that evidence which tends to prove a fact in issue by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the facts exist which are sought to be established. It is legal evidence which you must consider and act upon along with the direct evidence in the case.

No different degree of certainty is required of circumstantial evidence than of direct evidence for, regardless of the type of evidence adduced, the Government, in order to obtain a conviction, must establish an accused's guilt beyond a reasonable doubt.

However, with respect to circumstantial evidence, if reasonable inferences to be drawn from the evidence lead to two conclusions, one favoring guilt and the other favoring innocence, then it is your duty to accept that which favors innocence.

If the direct and circumstantial evidence introduced in this case and the fair and reasonable inferences drawn therefrom exclude any reaonsable theory of innocence, and indicate, as the only reasonable theory to be deduce,' therefrom, the guilt of a defendant, and provided they do so beyond a reasonable doubt, then and only then, is a verdict of guilty proper with respect to that defendant.

No conviction can be based upon suspicion, conjecture, or mere probabilities as to any one of the elements necessary to prove the charge asserted.

United States v. *Broverman,* CR 158-174 (SDNY SMP 1658-1659).

REQUEST NO. 28

Charts and Schedules

Any chart or schedule admitted in evidence was received for the purpose of summarizing the allegations claimed by the prosecution. In other words, such a chart or schedule merely is the prosecutor's pictorial summary of what he contends the evidence shows.

Such chart or schedule, however, is not in and of itself evidence or proof of any facts. It was used only as a matter of convenience. Upon no circumstances may you consider it as independent evidence of anything.

If the chart or schedule does not correctly reflect facts shown by the evidence in the case, you are to disregard it entirely.

Defendant's Supplemental Requests to Charge.

REQUEST A

In order to find Jackson D. Leonard guilty of either charge in this indictment you must find that he personally signed the income tax return in question. If you have a reasonable doubt as to whether or not Jackson D. Leonard signed the particular return in question, you must acquit him on the Count to which that income tax return pertains.

REQUEST B

If you find that Jackson D. Leonard did not see the income tax return in question prior to its filing with the Internal Revenue Service, you must acquit him on the pertinent Count of the indictment.

REQUEST C

If you have a reasonable doubt as to whether or not Jackson D. Leonard gave authority to Edward Leskowicz to sign the 1968 income tax return in question, you must acquit him on Count Two of the indictment.

REQUEST D

If you have a reasonable doubt as to whether or not Jackson D. Leonard signed the 1967 income tax return, you must acquit him on Count One of the indictment.

Defendant's Supplemental Requests to Charge.

REQUEST E

It is impossible from a legal point of view for the sole shareholder of a corporation to embezzle funds from his corporation. Money received by Mr. Leonard from his corporation, The Leonard Process Co., Inc., is income to Mr. Leonard only to the extent that there are current or accumulated earnings and profits. The proof in this case shows that in the first year of operation, the corporation sustained a loss of approximately $73,000. Therefore, I instruct you as a matter of law that the checks addressed to The Leonard Process Co., Inc. from the period February 1968 through November 1968 are returns of capital and are not taxable. The government has the obligation of proving each element charged in the indictment. The government must prove that the checks received in 1968 were income to Jackson D. Leonard. If you find that the government has failed to prove the existence of current or accumulated earnings and has failed to establish the basis of Mr. Leonard's stock, then you must acquit the defendant on Count Two of the indictment.

REQUEST F

Jackson D. Leonard respectfully requests that the Court read to the jury Title 26 United States Code §§ 61, 62 and 162.

Government's Requests to Charge.

The Government respectfully requests the Court to include the following in its charge to the jury:

* * * * * *

REQUEST NO. 3

ELEMENTS OF THE OFFENSE

In order to find the defendant guilty of the crimes charged in Counts One and Two you must find the following elements beyond a reasonable doubt:

First: That on or about June 14, 1968 and August 15, 1969, in the Southern District of New York, the defendant did make and subscribe United States Individual Income Tax Returns, Form 1040, for the calendar years 1967 and 1968, verified by written declarations that each was made under the penalties of perjury;

Second: That the defendant knew that the return under consideration was not true and correct as to a material matter, to wit: the adjusted gross income reported; and

Third: That he did so unlawfully, wilfully and knowingly.

(Title 26, United States Code, Section 7206(1); *United States* v. *White,* 417 F.2d 89, 93-94 (2d Cir. 1969); *United States* v. *Slutsky,* 487 F.2d 832 (2d Cir. 1973); *United States* v. *Bishop,* 412 U.S. 346 (1973)).

* * * * * *

Government's Requests to Charge.

REQUEST NO. 6

Similar Conduct

The Court has permitted evidence concerning transactions of the defendant in years prior to, as well as subsequent to, the years covered by the Grand Jury's indictment. This evidence was not admitted as proof of evasion or falseification of returns, but was admitted solely and exclusively for the purpose of showing a pattern of conduct on the part of the defendant in earlier and subsequent years and bears only upon his intent to violate the statute for the years in question in the Indictment. This evidence of prior and subsequent conduct is not conclusive as to the defendant's intent in the years charged in the Indictment, but is merely a circumstance to be considered along with the other evidence in determining whether or not there was the requisite intention on the part of the defendant.

(*United States* v. *Jernigan,* 411 F.2d 471, 472-473 (5th Cir. 1969); *United States* v. *Slutsky,* 487 F.2d 832, 844 (2d Cir. 1973)).

* * * * * *

Memorandum of Law.

The Government theorizes in its bill of particulars that the funds received in 1968 were embezzled by the defendant from his corporation. However, it is impossible to embezzle funds from a wholly-owned corporaion. *Davis* v. *United States,* 226 F.2d 331, 335 (6th Cir. 1955), cert. denied 350 U.S. 965 (1956) and *Currier* v. *United States,* 166 F.2d 346 (1st Cir. 1948).

Diversions of corporate funds from a wholly-owned corporation by the sole shareholder are taxed as a constructive dividend, not embezzlement income. *Federbush* v. *Commissioner,* 325 F.2d 1 (2nd Cir. 1963).

The law in this Circuit is that distributions from a corporation which constitutes diversions of corporate funds by the sole shareholder are either returns of capital (which are not income) or constructive corporate dividends. These payments, however, are dividends only to the extent there are accumulated or current earnings or profits. *Dizenzo* v. *Commissioner,* 34 F. 2d 122 (2nd Cir. 1965).

The corporation's first year of operation was 1968 wherein its losses approximated $73,000. In 1968 the alleged diversions of corporate funds amounted to some $58,000. Since there are no current or accumulated earnings of the corporation, the payments allegedly diverted to the defendant, at most, constitute a return of capital which, of course, is not income. Since the checks received by the defendant in 1968 were not income to him, Count 2 of the Indictment should be dismissed.

Respectfully submitted,

KOSTELANETZ & RITHOLZ
Attorneys for Defendant

JOHN J. TIGUE, JR.
Of Counsel

Notice of Motion for Judgment of Acquittal and a New Trial.

SIR:

PLEASE TAKE NOTICE, that upon the indictment herein, the affidavit of John J. Tigue, Jr., sworn to March 5, 1975, and all other papers and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Richard Owen, United States District Judge, in the United States Court House for the Southern District of New York, Foley Square, New York, New York, at 2:15 p. m., Friday, March 7, 1975 for an order pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, for a judgment of acquittal or, in the alternative, for a new trial, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York, March 5, 1975.

Yours, etc.

KOSTELANETZ & RITHOLZ
Attorneys for Defendant

By ARTHUR BROOKS

To:

HON. PAUL J. CURRAN
United States Attorney, Southern District
of N. Y.

Affidavit of John J. Tigue, Jr.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN J. TIGUE, JR., being duly sworn, deposes and says:

1. I am associated with the firm of Kostelanetz & Ritholz. This affidavit is submitted in support of defendant's motion for a judgment of acquittal or, in the alternative, a new trial.

2. The grounds upon which defendant moves for a judgment of acquittal or a new trial are set forth hereinafter under separate category:

A. MAIL WATCH AND SECRET SPECIAL AGENT ISSUE

The genesis of the defendant's audit by the Internal Revenue Service was in a mail watch conducted by Special Agents of the Internal Revenue Service. Based on a surreptitious viewing in 1968 of the envelopes mailed to the defendant and others, an "audit" was instituted in the same year. Revenue Agent Laski instituted the audit which, it is submitted, was in essence a criminal investigation conducted by a revenue agent functioning as a special agent under the direction of Internal Revenue Service Special Agent Boller. As was argued at trial, it is submitted that the mail watch constituted an invasion of privacy and the resulting audit was conducted in essence by a law enforcement official who did not provide the defendant with his Miranda warnings as required by Internal Revenue Service procedure.

B. THE ADMISSION OF SIMILAR ACT EVIDENCE

At trial the government introduced evidence of several allegedly similar acts which, while highly prejudicial to the defendant, were of relatively minor probative value of

the charges in the indictment. The government introduced an affidavit of defendant stating he had no interest in, nor had any dealings with, any foreign banks. In spite of defendant's pre-trial motion for particulars of similar acts, none were forthcoming from the government until the eve of trial at which time copies of checks totaling $383,000 from Chase Manhattan Bank were received from the government. The Chase Manhattan Bank employee who testified at the trial, indicated to me, to the best of my recollection, that he had first been contacted by Mr. MacDonald in early December 1974. It is submitted that, in view of the overwhelmingly prejudicial impact this evidence had at the trial, the early knowledge of such information by the government and the destruction of the supporting records by Chase Manhattan Bank deprived defendant of a fair trial.

In addition, the government offered evidence regarding a second allegedly similar act relating to a conversation which took place years after the charges in the indictment. Mrs. Brooks testified that Leonard admitted to her he had a Swiss Bank account in 1971. The government then offered in evidence defendant's 1971 income tax return which contained a statement that defendant had no Swiss Bank account. This allegedly similar act was even more remote that the first and was equally prejudicial. The evidence offered by the government on this similar act was of practically no probative value regarding the underlying charges in the instant indictment. The government also stressed in its summation the importance of these two similar acts.

C. Government's interference with defendant's interview of prospective witnesses

An additional ground offered by defendant in support of this motion is the previously made motion regarding the Assistant United States Attorney's direction to various

actual and potential witnesses at the trial, all of whom were government agents. It is submitted that it is improper for the prosecution to direct any witness to refuse to answer questions put to them by defense counsel for the accused or to insist upon being present at such interviews prior to trial. The affidavits submitted post-trial by these witnesses were obviously drafted by the Assistant United States Attorney and are all identical to one another.

D. Insufficiency of evidence on count one of the indictment

It is submitted that the evidence relating to the 1967 charge was insufficient in that the person who prepared the return never testified as to how the return was prepared or upon what information. The government did call Miss Bardes who admitted that she did not prepare the return and that she did not know the slightest piece of information about the return. It is submitted that there was no evidence sufficient to permit a reasonable jury to conclude that defendant signed the 1967 return knowing it was false.

E. Insufficient evidence as to count two

The evidence is undisputed that defendant neither signed the 1968 return nor saw it prior to its submission to the Internal Revenue Service. It is submitted, based on these facts, that no reasonable jury could find that defendant knowingly signed a false income tax return.

F. Inaccurate testimony before the grand jury

It is respectfully requested that the presentation by the government to the Grand Jury should be marked as a Court exhibit for purposes of any possible appeal. It is submitted the defendant should be granted a new trial based upon the apparent inaccurate testimony by Agent Schulman before the Grand Jury.

Affidavit of John J. Tigue, Jr.

G. Government's opening statement

At the trial the government's opening statement (Trial Transcript page 20) consisted of ten pages. The first five pages are devoted to general introductory remarks and allegedly false statements made to Agent Laski by the defendant. The last five pages of the opening statement (Tr. 26-30) relate to two conversations the defendant allegedly had with other agents of the Internal Revenue Service. The government indicated that it would prove, during the course of this latter conversation, that defendant made statements which were untrue and that Leonard concealed information from the Internal Revenue Service. The entire ten pages bear reading. At the trial government never offered a shred of evidence to support the prejudicial allegations claimed in the last half of its opening statement. It is submitted that the highly prejudicial remarks made in the opening statement severely harmed the defendant and that he should be granted a new trial.

It is respectfully submited that the defendant, Jackson D. Leonard, be granted a judgment of acquital or, in the alternative, a new trial.

(Sworn to by John J. Tigue, Jr., March 5, 1975.)

Affidavit of Arnold Reiner.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

ARNOLD REINER, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of the circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by Arnold Reiner, January 24, 1975.)

Affidavit of Jerry Sussman.

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

JERRY SUSSMAN, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of the circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by Jerry Sussman, January 27, 1975.)

Affidavit of Mortimer Laski.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT OF CALIFORNIA } ss.:

MORTIMER LASKI, being duly sworn, deposes and says:

1. I am an employee of the Internal Revenue Service and, as such, have participated in some activities in regard to Jackson D. Leonard, the defendant.

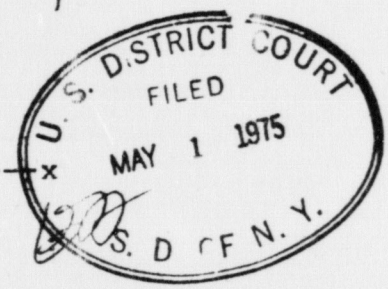
2. This affidavit is submitted in support of the Government's position that the defendant's right to ascertain the facts has not been impeded or otherwise infringed by my having voluntarily submitted a sworn deposition to his counsel while being aided and counseled by an Assistant United States Attorney as to the propriety of various of the questions propounded.

3. At the time of my deposition, I desired the aid and assistance of counsel in ascertaining the scope of the inquiries being made of me and the propriety, under all of the circumstances involved in this case, of my responding. Rather than retaining private counsel or relying on Government counsel unfamiliar with the details of this case and all relevant circumstances, it was my desire to receive the advice of the Assistant United States Attorney actually assigned to the matter.

4. Mr. Tigue's original request of me for information did not specify his desire for a private interview without my having access to counsel. If he had so specified, I would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case.

(Sworn to by Mortimer Laski, January, 1975.)

FILED



hpe 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against- : 74 Cr. 599(RO)

JACKSON D. LEONARD, :

Defendant. :

January 6, 1974
11:40 a.m.

Deposition of MORTIMER LASKI, taken by defendant pursuant to agreement of counsel, at Room 301-B, United States Courthouse, Foley Square, New York, New York, before Herbert H. Prokop, a Shorthand Reporter and Notary Public of the State of New York.

43

APPEARANCES:

PAUL J. CURRAN, ESQ.
United States Attorney
For the Government.
BY: W. CULLEN MAC DONALD,
Assistant United States Attorney

KOSTELANETZ & RITHOLZ, ESQS.
Attorneys for Defendant
80 Pine Street
New York, New York
BY: JOHN J. TIGUE, JR.,
of Counsel.

- - -

xx MORTIMER LASKY, having been first duly sworn by the Notary Public, was examined and testified as follows:

MR. MAC DONALD: We have discovered handwritten notes of Schulman and Levy and we are determining, are in the process of determining, whether or not any of these relate to their preparation for or the actual conducting of an interview with your client.

If it is determined they do, we are going to make a claim they are not 3500 material, since

they were not intended to be a transcript or an accurate verbatim recording of your client's words and you will have to ask the Court for relief concerning their production.

MR. TIGUE: Would it not be Section 16A material as opposed to 3500 material, in any case?

MR. MAC DONALD: No. We would take a look at them first. If it looks like they attempted to record the verbatim words of your client, then we will produce them. To the extent they didn't make such an effort --

MR. TIGUE: I see what you mean. I don't agree with that of course, but I understand your position.

Before we start, Mr. MacDonald, I understand you have given me a copy of the activity record, one page, and I gather there are other cases.

MR. MAC DONALD: We think you have everything in respect of activity records that relate to this witness. You have coming to you other activity records with respect to other witnesses.

You have others coming and I think as a matter of fact the next one in line is Bernard Singer. It is the one that he testified began

began on July 20, '70 and the next entry, at the top of the next page is July '70.

MR. TIGUE: It coincidentally finishes on the bottom line.

MR. MAC DONALD: Yes.

MR. TIGUE: May I ask what the other material is, the referral report?

MR. MAC DONALD: Mr. Laski had a hand in its authorship which he will describe to you. He will describe an eight hour conversation he had with Singer which encompassed the subject of referral and he will describe although he never read it, i was typed at some later time, he had some hand in its authorship in the sense he had a conversation with its true author.

xx EXAMINATION BY

MR. TIGUE:

Q Mr. Laski, my name is John Tigue. I am the attorney for Jackson Leonard in a criminal case which is to begin shortly.

Do you understand that?

A Yes.

Q Are you employed by the Internal Revenue Service?

A Yes, I am.

Q How long have you been so employed?

A Nine and a half years.

Q What is your present occupation with the IRS?

A I am a lead instructor at the Training Center in Van Nuys.

Q Did there come a time when you worked on the audit of Jackson Leonard?

A Yes.

Q When did that start, please? When were you assigned?

A About the summer of '68.

Q Would that be August 7, 1968?

A On or about then.

Q When did your assignment on that case terminate?

A When I transferred to the Los Angeles District, June 5th, 1970.

Q To whom did you assign the case upon your departure?

A Bernard Sand.

Q Did you initially contact Mr. Lefkowitz?

A Initial contact, yes.

Q During the course of your audit, I take it you prepared work papers and work sheets?

A Yes.

Q Do you know where those documents are now?

MR. MAC DONALD: I will represent that I have possession of all the work papers that you have subpoenaed.

Q Did you examine any of the documents prior to today, recently, that is?

A I have looked at some of them.

Q Let me ask you about this one, my marked up copy, document 605.

Will you tell me if that is your handwriting, sir?

A Yes.

Q The entire document?

A Not the entire document. That's not mine up here (indicating).

Q It's a photostat with felt tip pen and the felt tip writing is mine.

The underlying writing is all yours?

A Yes.

Q There is a number in the upper righthand

corner.

Is that your handwriting, sir?

A It doesn't look like it.

Q It may be that was written by a subsequent agent.

A I don't know if that's a --

Q It is not your handwriting?

A I don't think so.

MR. MAC DONALD: I want to call your attention to some handwriting that appears under what I have circled.

Q Is that your handwriting, which appears to be November 30, December 30?

A Yes.

Q Can you tell me when you wrote number 605?

A Not the exact date. It was on about the early part of the audit.

Q The audit extended for two years, right?

MR. MAC DONALD: Don't generalize.

I think the question if it is recast in a less leading form is apt to obtain a responsive answer as to the days when the audit was conducted.

Q Mr. Laski, would it help you to fix the date more firmly if you look at the activity work

sheet?

A It appears the actual audit started on November 8.

Q The case was assigned to you in August, but you started work in November, is that right?

A No.

MR. MAC DONALD: I object to the form. It appears from that record that Mr. Leonard's representatives and lawyers were unavailable to allow access until November, and so once again, it is leading with respect to when work began by this witness.

I don't want that question quoted back --

MR. TIGUE: I understand.

Q Which years were you auditing?

A 1965, 1966 and 1967.

Q Did you have any responsibility for the prior years?

A Prior to '65?

Q Yes.

A No.

Q Were you aware there was a matter of some litigation or protest?

A Yes.

MR. MAC DONALD: Did Leonard or his representative give you any information in respect of that awareness?

THE WITNESS: There was a prior RAR and the appellate report.

Q You examined those in the normal course of preparing your audit?

A Yes, I did.

Q Can you tell me to the best of your recollection, as precisely as you can, when 605 was written by you? 605 is the handwritten notes before you.

A I don't think I can give you an exact date.

Q Can you give me your best recollection, sir?

A It would be somewhere towards the end of '68.

Q You were auditing '65 and '66 and '67 as well?

A Yes, I was.

Q '68 had not yet been filed, is that right?

A Right, it hasn't been filed. I didn't

go into '68.

Q You never did any work in 1968, on the 1968 tax return?

A I don't believe I did.

Q Could you tell me how you came to get the information for the portion at the bottom which relates to a striked out provision of the contract?

A Where it says crossed out, plus a fee of ten percent of said amounts to cover contracts --

Q Yes, sir.

A When I had asked Mr. Lefkowitz to provide the contract for my analysis of deposits in going through the Union Carbide contract, I noticed that this one clause was crossed out, and I happened to ask why was this clause crossed out. This was in conjunction with my analysis of deposits which show that all the deposits that should have been made had not been made.

It had led to a question. So, I had looked at this contract in relation to my schedule of deposits from the bank and --

MR. MAC DONALD: May I ask a clarification?

MR. TIGUE: Yes, please do.

MR. MAC DONALD: In you request of Mr. Lefkowitz for documentation in respect of those deposits, would you describe whether that request was limited to contracts or give us your best recollection of the request you made?

THE WITNESS: During the analysis of deposits my normal routine would be to grab the most obvious information first which would have been a request for contracts, but I never limit my requests.

I would have asked for the contracts plus anything else that would go along with it which would have included any invoices, bills, anything you can think so.

I would take a shot gun approach towards my receipts.

BY MR. TIGUE:

Q That would be normal auditing technique.

A For everybody, including myself.

Q Who was it who gave you the contract to look at?

A I think it was Mr. Lefkowitz.

Q Did you make a copy for your own file?

A No, I don't believe I did. I think most

of the contracts I just took notes.

Q Did you ask anybody for a contract and you were reviewed during the course of the audit?

A Not that I remember.

Q Do you have any difficulty remembering some of these things which happened back in 1968?

A Some things aren't as clear as I would like them to be.

Q Which deposits --

MR. MAC DONALD: I wonder if you care whether that difficulty relates to the areas in which the witness has refreshed his recollection or areas in which he has not refreshed his recollection on the subject matter of this lawsuit or the subject matter of the entire audit.

That's certainly a question which isn't very useful to the jury or anybody else unless --

MR. TIGUE: It seems to me it is an honest answer.

MR. MAC DONALD: Do some of such things include, for example, the music business Leonard operated with his wife as to which you haven't looked at work papers since 1968?

THE WITNESS: I haven't looked at it but

the music business stood out in my mind.

You see, this was the last case that I actually was involved in when I left the District so it stood out in my mind.

BY MR. TIGUE:

Q Did you notice that the contract that you were reading from was marked "conformed copy" in the upper righthand corner?

A I didn't notice that.

Q Was it an original contract that you looked at, sir?

A I think it was. I had been given six or seven contracts and to my mind, they were all originals.

Q When is the first time you met Mr. Leonard, as best you recollect, sir?

A The first time I met Mr. Leonard, I believe, was in the late Spring of 1968.

MR. MAC DONALD: Do you mean '69?

THE WITNESS: Excuse me, 1969, late spring. Somewhere around March, April.

Q Where did you conduct the early part of your audit, in your office or --

A Mr. Lefkowitz's office.

Q I notice there is an entry on your activity report which says -- on November 4 -- "Audit- next appointment, 11-7."

On the last line I have difficulty reading my copy. It looks like 3-12 and I can't make out the other number.

A I'm sorry, you asked --

Q If you can read the number on the very last line, the lower lefthand corner.

A I think I have 3-12 and 3-18.

MR. MAC DONALD: The original looks like 3-17, 3-18.

Q Who is Howard Walsh, incidentally?

A One of the employees at the IRS.

Q Your superior?

A No, just a different department. He may have been superior, I don't know.

Q He wasn't your boss or group chief?

A No.

Q When you met Mr. Leonard for the first time, would that be after March 12 or 18, 1969?

MR. MAC DONALD: It is 17, 18, isn't it?

Q Was it after that date that you met Mr. Leonard for the first time?

A It's hard to say. I would think it must have been one of those two dates.

Q The 17th or --

A One of the two dates.

Q What was the occasion of your seeing Mr. Leonard at that point?

A Well, I ran into a snag with Mr. Lefkowitz on one hand and because of the nature of a project I was on that involved this case, I was given permission to go ahead or given orders to go ahead and make contact with the taxpayer to directly ask him a specific question.

Q What project was that?

A The foreign bank account project.

Q And the specific question you asked him?

A "Do you have any foreign bank accounts?"

Q You asked him in substance, Mr. Leonard, do you have a Swiss bank account?

MR. MAC DONALD: I think Mr. Laski gave you one of the subjects at that meeting.

Q Why don't you give us in a narrative what happened on that day, please, the first day you met Mr. Leonard?

A At the meeting or why --

MR. MAC DONALD: What happened at the meeting.

A We covered three or four things at the meeting. Mr. Lefkowitz had not prepared some of the returns and many of the questions I would ask him he would defer to ask Mr. Leonard. We reached a point where a couple of the questions I wanted to ask Mr. Leonard directly because I wasn't getting the answers I wanted.

I waited for this opportunity when I was given permission and given direction to talk about the FBA project. I asked Mr. Leonard, do you have any foreign bank accounts and he said, no.

I pressed the point and I said, "Do you have any foreign bank accounts, a second time, and he mentioned he had only that one he was doing business with in Australia, on some project, the LaPorte or something.

Being somewhat pushy, I pressed a third time and I said, Do you have any other foreign bank accounts and he said, "No, I don't, except for the one in Australia, that's the on account I have."

Then we got to talking about Union Carbide. I had a shortage of deposits. I should have had seven for that year, according to the contract, and I had two or three. There were four deposits of the $37,000 each which I didn't have. I wasn't satisfied with the answer I was gettin from Lefkowitz. When I asked him what happened to those deposits, on the contract itself, I should say, there were no crossing outs, no initials.

I was possibly more curious having been a law student, how the thing was changed and I got involved in it legally, I might say.

He said even though nothing was crossed out, that they had delayed the payment schedule and I said, do you have any piece of paper showing me that the payment schedule was delayed and he said no.

We turned to the next part of it -- this was the ten percent overage or retainage he was supposed to get back. Here there were cross outs but no initials. I said, you know, do you have any paper to show me why this was taken out of the contract and he said no.

I said how come this is crossed out and

the other one was left blank and, you know, there was no answer to it.

Q I don't understand. This was crossed out and the other was left blank.

What does that mean?

A The section for the ten percent was crossed out.

Q What was left blank?

A The other section that called for the $37,000 payments to get ten $37,000 payments that was left as it was.

There were no markings on that page at all. On the page that called for the ten percent, that was crossed out. In either event was there any correspondence or showing that anybody on the part of the Union Carbide had agreed to this.

Possibly because I was in law school, I got interested, and probably for no other reason. The other thing I was asking which was getting me interested throughout the course of the audit, there was a payment made that I couldn't find out from what account. It was a $28,000 payment. I kept getting the word that it was made in cash. I said, "Cash from where," and I never got the answer to that

either.

Q What $28,000 payment? What was that about?

MR. MAC DONALD: So we can have a point of reference and refresh the witness' recollection, maybe you can give him that report.

A Catalytic Construction Company of Canada. Since I was told there was one bank account and I had checked it in complete detail, I want to know where it came from.

Q What year did that pertain to?

A I was doing it three at one time. I think it was '67.

Q There was a deduction taken on his income tax return for which there was no substantiation.

A I was more concerned with the fact there was a payment made that I couldn't trace the fund from. I wasn't all that concerned about the deduction at that moment. I was doing a cash analysis and I wanted to know where that payment came from.

There was also a technical issue which we got involved with and that was payment which Mr. Leonard received from Chinook, where he received

two $100,000 payments which came down as $94,000, a six per cent discount and he said by the law of Canada he was required, if he wanted to buy stock in the company as payment for his services, he had to take cash and reinvestment. We wanted to hold that as income for him and then purchase of stock. That's what we discussed in our face to face meeting.

Q Did you contact Union Carbide after having spoken with Mr. Loenard?

MR. MAC DONALD: Maybe you can tell me the materiality of why Mr. Laski may have been in contact after that conversation.

MR. TIGUE: Mr. Laski, I believe stated he wanted to know why some contracts were not changed and another one was lined out and whether there were any documents to support that. I was just wondering whether Mr. Laski went independently to Union Carbide to confirm or deny --

MR. MAC DONALD: Just to control this aspect, I will ask a few leading questio and if you want to broaden it, maybe I will satisfy you.

MR. TIGUE: All right.

XX EXAMINATION BY

MR. MAC DONALD:

Q In or about the summer of 1969, did you cause third party form letters to be sent to all or at least a number of the chemical companies that had appeared on the bank deposits that Mr. Leonard had submitted, asking him to confirm gross payments?

A Yes.

Q Was one of those letters addressed to Union Carbide?

A Yes, it was.

Q And thereafter, in the cases of some companies, did you have to send second requests since the first went unanswered?

A Yes, I did.

Q Did you in or about October or November 1969 receive an answer in the form of a tabulation from Union Carbide showing gross payments?

A Yes, I did.

Q Thereafter, did you make a request of Union Carbide for copies of the checks which had been so tabulated?

A Yes, I did.

Q In or about 1970, did you receive from Union Carbide those checks?

A Yes, I did.

xx BY MR. TIGUE:

Q In the course of doing all this, did you come back to Mr. Leonard and ask him for a further explanation after you had obtained these various documents?

MR. MAC DONALD: Was that occasion you have already described the only face to face contact that you have had with Mr. Leonard?

I think that would be easier.

THE WITNESS: Yes, it was. Can I add one thing? One of the main reasons -- you asked me about a face to face confrontation.

I went there primarily --

MR. MAC DONALD: Mr. Laski, I am going to instruct you not to tell what instructions you received or your mental motivations. He is only entitled to the conversation with Mr. Leonard. It may be I will change that instruction at some point but for the time being you will have --

THE WITNESS: All right. It was nothing of any significance.

MR. TIGUE: I don't agree with that. The witness appeared willing to answer and I maintain my objection to your interposing yourself between the questions and the answers.

MR. MAC DONALD: Ask a question.

BY MR. TIGUE:

Q The fact of the matter is that after that meeting sometime on March 17th or 18th, as best you can recollect, that was the last time you ever spoke to Mr. Leonard?

A To the best of my recollection.

Q When you had this conversation with Mr. Leonard, who else was present, if anyone?

A Mr. Lefkowitz.

Q You are sure of that?

A Yes.

Q You mentioned also there were no initials on the contract.

Are you sure of that?

A Not on the entire contract. On the clause --

Q There were one or two lines which were stricken and is it your best recollection there were no initials in the margins?

A No initials.

Q You are sure of that?

A Yes, I am.

Q Are you aware that that contract is being analyzed chemically?

A I heard it was.

MR. MAC DONALD: Have you received the results of that analysis to help your best recollection, yet?

THE WITNESS: No. I just learned about it now.

Q Did there come a time when you asked Mr. Leonard to supply you with an affidavit regarding foreign bank accounts?

A Yes.

Q How did that come about?

MR. MAC DONALD: Let me interject. The question is unduly broad and imprecise and as a substitute I would propose you describe to Mr. Tigue the communication you had with Leonard's representatives and give your best recollection of such communications in respect of that subject.

A We were asked by the project manager to

get an affidavit from the taxpayer stating that he had no foreign bank accounts or business dealings with foreign banks.

I requested Mr. Lefkowitz to see that I got the statement; I dictated the paragraphs I wanted and Mr. Lefkowitz saw the affidavit came forth.

Q Do you recall when that was?

A Pardon me?

Q Do you recall when that was?

A It must have been very late in '69. Somewhere around October, November.

MR. MAC DONALD: Would it refresh your recollection if I told you the affidavit was dated August '69?

THE WITNESS: August of '69. It's a few months earlier than I thought.

Q How long did this meeting you had with Mr. Leonard last on March 17 or 18, 1969?

A We had a discussion between us for about a half an hour, 40 minutes.

Q Did you make any notes during the course of that meeting?

A No, I didn't take notes during the meeting.

Q Do you know if anyone else took notes during that meeting, like Mr. Lefkowitz or Mr. Leonard?

A I don't think Mr. Leonard did and I don't believe Mr. Leonard did either. I was looking at Mr. Leonard so I don't know what Mr. Lefkowitz was doing.

MR. MAC DONALD: Do you have a document to refresh the witness' recollection at this point?

MR. TIGUE: No. Do you?

MR. MAC DONALD: The question was did Mr. Lefkowitz take notes and I am about to show you a document, document 01394 -- withdrawn.

The part that I am referring to says "Affidavit re foreign account" and of course that may have well related to a telephone conversation.

MR. TIGUE: Is this one of Mr. Lefkowitz's work papers?

MR. MAC DONALD: Yes.

BY MR. TIGUE:

Q This activity report you have before you, Mr. Laski, shows all the dates which you worked on the Leonard case, is that right?

A I would think these would show all the

dates that I worked on the Leonard case at Lefkowitz's office or in the field. Any work I did in my own office I would have put down in the activity record, if I was writing up, reviewing and --

Q This is the activity record, is it not?

A Yes, when I would be at Mr. Lefkowitz's office. Every time I was in my office, I wouldn't write it -- this is an activity record when I was out of the office. I didn't keep a record when I sat at my desk.

MR. MAC DONALD: In other words, if you worked for an hour at your desk you wouldn't make an entry?

THE WITNESS: No.

Q Aren't you supposed to file a monthly report or --

MR. MAC DONALD: I would object to that.

MR. TIGUE: The witness will tell you they are required to file monthly time sheets which requires him to indicate the amount of time spent on each case. Even though it might not appear on the activity report, agents --

MR. MAC DONALD: Don't bother answering

that question. I would like to read that first to determine whether Mr. Tigue is properly characterizing that.

MR. TIGUE: It is certainly 3500 material in my judgment and I would ask that be produced at the trial. The same is true for all the agents, incidentally.

Mr. Schulman may be of some assistance to you in that regard.

MR. MAC DONALD: I was advised there is no such thing as a daily report filed.

MR. TIGUE: Off the record.

(Discussion off the record.)

MR. MAC DONALD: We will take that under advisement.

BY MR. TIGUE:

Q Can you tell me what you did in the case during 1970?

What work did you do on the Leonard audit?

A Actually through the first five months of 1970, it was a waiting game, waiting for information to come in. I wasn't going to proceed with the '68 return because I was leaving to transfer to another district and I had sit-in assignments for a

period from almost September of '69 through May or June of '70.

Q So there was almost a year there when there was no activity in the Leonard case?

MR. MAC DONALD: There is no need to characterize it in that fashion. You were told there were outstanding third party requests by letter and the witness said --

Q Other than that.

A That was the heart of the matter at that point.

MR. MAC DONALD: How many other cases did you have in your file drawer, approximately, throughout the period of this assignment?

THE WITNESS: I had maybe ten or 15 other cases but that didn't matter. I wasn't working on cases primarily. I was acting in other capacities.

Q For instance?

A Sitting in as a supervisor. As you might remember, if you dealt much with the district, I was one of the coordinators sitting in for the FBA project.

MR. MAC DONALD: Let the record indicate Mr. Tigue nodded his head showing an acquain-

tanship with the witness.

Q In your entire life the conversation you had with Mr. Leonard lasted 30, 40 minutes?

A To the best of my recollection, that was it.

MR. MAC DONALD: This is going to be quoted for the jury. Mr. Tique's purpose in asking leading questions so they will be more quotable and can be read to the jury in a more effective fashion, defending Leonard. One should be sensitive to that purpose in responding.

MR. TIGUE: That's not the case at all. I am talking to Mr. Laski this morning to find out the facts in the case.

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MR. MACDONALD: The last question was unnecessary, a repetition, and was just cast in an argumentative form, that in his entire life he had only one response. At any rate, let's go on with the examination.

MR. TIGUE: I do object to your telling the witness what my motives are.

MR. MACDONALD: I am telling the jury --

MR. TIGUE: I wish you wouldn't tell the witness what my motives are. My motive is to find out what the facts are.

MR. MACDONALD: Sometimes it is something quoteable and sometimes to illicit information.

Q Did you have a hand in preparing the fraud referral report which I have in my hand?

MR. MACDONALD: He has described what, if anything, he did with respect to the preparation of that document.

A Yes, when the case was being transferred to Mr. Singer, since I had worked it up to this point, I gave Mr. Singer the background information to write the fraud referral: The age of the taxpayer, the sex, educational background, health standard, and some of the substantive portions we were holding

against him.

Q Which was what?

A Well, they were primarily --

MR. MACDONALD: Would it be helpful, Mr. Laski, if you had the report in front of you in responding to that question rather than having a memory test of its contents?

Q If you want to take a look at it, you are welcome to. Does it help you or do you remember?

A It doesn't matter. The basic issues were unreported income from the Union Carbide contract in the year 1967; the source of a $28,000 payment to Catalytic; the 10 percent overage that was claimed not to have been received by Mr. Leonard; unsubstantiated expenses, and the fact Mr. Leonard claimed there was only one domestic bank account.

We had feelings and evidence that there was more than one. And, a narrative background of what I had done over the last couple of years, the depth to which I had taken the audit.

Q Where did Mr. Leonard have a bank account other than the one you had performed the cash analysis on?

A Franklin National Bank, I think it was.

Q You determined that he had a bank account there?

A From one of the cancelled checks.

MR. MACDONALD: Is it your memory as refreshed, that you received from Union Carbide in August '66, a $10,000 check which bore an endorsement of Franklin National Bank thus leading you to believe when you received a copy of that check in May of '70 that Leonard's prior statements that he had only one domestic bank account into which he deposited all the receipts was incorrect?

THE WITNESS: Yes.

Q Did you determine whether or not he had that second account?

A I personally did no further work on the case. I was leaving the state.

Q You don't know whether or not he in fact had one?

MR. MACDONALD: As to your state of knowledge today, you are instructed not to answer. If Mr. Tigue wants to limit it to the time you left for California, I think he has an answer.

Q Do you know when you left for California, he had an account at the Franklin National Bank?

A I had the evidence from the check, but I didn't check it out. That's what the next agent was on the case to do.

Q Since then did you come up with information as to whether or not he had such an account?

MR. MACDONALD: And excluding all conversations you had with me or with Shulman in the course of preparing for trial, have you received any information in respect to this case from any other sources?

THE WITNESS: When I left New York I left Leonard. Leonard was one case I was working on. I had new assignments in California. I really didn't come back to look for Leonard or didn't --

MR. MACDONALD: I may have communicated to this witness with something in the course of preparing him for testifying at the trial.

Q When was the first time you ever met or spoke to Mr. MacDonald?

A I think I poke to Mr. MacDonald August or September -- it must have been just before the grand jury. I think he called me the case was going to the grand jury and --

MR. MACDONALD: THe indictment in this case was brought down on June 13th or 14th, 1974. That

might help you.

Q Assuming that's when it was filed, was that the time of the conversation?

A I imagine it was.

Q How often have you spoken to him since then?

A I had three or four calls, when he told me to come in once and once he told me not to come in when it was postponed and then the new date.

Q Have you discussed the facts with him on the phone or in person or both?

MR. MACDONALD: That's one of the questions he is putting in quoteable form and there is no need to answer it.

Q Have you discussed the facts of this case with Mr. MacDonald?

MR. MACDONALD: The same thing unless Judge Owen directs you to answer it.

Q You are a lawyer, Mr. Laski?

A Yes.

Q Do you want to answer that question?

MR. MACDONALD: You are making a record --

MR. TIGUE: It seems to me the witness is fully prepared to answer the question. It seems to me

he is an experienced government employee, member of the Bar, and he can probably make his own decisions or have his own judgment exercised and not yours, Mr. MacDonald.

MR. MACDONALD: You have stated your feelings.

MR. TIGUE: I would like him to answer the question.

MR. MACDONALD: You are not entitled to a response.

Q You choose not to answer that question, Mr. Laski?

MR. MACDONALD: I will ask you not to engage in colloquy with Mr. Tigue, despite the fact that he is an old friend in some respects.

Q Who else did you discuss the case with, Mr. Shulman?

A Mr. Shulman called me and asked me about the case.

Q When did he do that for the first time?

A I think there was only one time when he did do it. That was December of '72.

Q What was that conversation all about?

A He just asked me if I remember about the case.

MR. TIGUE: It may be Mr. Shulman took notes about that conversation which would be 3500 material.

MR. MACDONALD: It is our position it is not, not having been read by, or subscribed to by this witness.

MR. TIGUE: It seems to me you are making quite a record here for Campbell.

MR. MACDONALD: Do you have any authority to call my attention to, about a piece of paper that the witness never saw somehow being subscribed, adopted or otherwise authored or approved by him?

MR. TIGUE: If it is substantially verbatim, sure.

MR. MACDONALD: You can ask Shulman if he took substantially verbatim notes or dictated substantially verbatim reports.

BY MR. TIGUE:

Q Who else have you discussed this case with besides those two gentlemen, Mr. Laski?

A With Mr. MacDonald --

Q Outside of Mr. MacDonald and outside of Mr. Shulman.

A I haven't discussed the case with anybody.

Q Or the facts of the case?

A I haven't discussed the case with anybody.

Q When you spoke to Mr. Shulman, did he ask you about your conversations with Mr. Leonard?

A I don't remember. He just asked me do I remember what happened with the case, can I give him some background. We didn't go into details, I don't believe.

The call came when I was on the run. I was very busy with what I was doing. It wasn't any special momentum that was given to this.

Q This conversation you had with Mr. Leonard, when was the first time anybody ever asked you about that?

A About the conversation with Mr. Leonard?

Q Yes.

A I would say very recently, the last couple of days.

MR. MACDONALD: I don't understand that response and I think the witness understood Mr. Tigue's question. If the question was in that conversation with Shulman did you discuss, you, Laski, describe to Shulman your conversation with Jackson D. Leonard in or about March of '69 -- is that the question?

MR. TIGUE: I thought my question was very precise. His answer seemed to have been responsive to the question. If you don't understand it, I don't know what I can do about that.

Q I have here a letter signed by Warren Slack, for Mr. MacDonald. You might want to take a look at that for a minute, Mr. Laski.

Have you seen that letter before?

A I think that my boss had given me a copy.

Q What does it mean when it says you worked on the Jackson Leonard case between 1965 and 1968?

MR. MACDONALD: I don't understand the purpose of asking that question. If you have some reason to quote somebody else's letter and ask what it means, I suggest that you call the author of the letter on the telephone and ask him that question.

I will tell you I am not going to make the slightest effort to bring that man from California here to aid you in that part of your inquiry.

Q Did you work on the case between 1965 and 1968?

A Yes, part of those years.

Q You were not assigned the case until 1969?

MR. MACDONALD: '68.

Q I'm sorry, '68, correct. You didn't work on the case between 1965 and 1968. You worked 1965, '66, '67, for those years, and you did that work in 1968 and thereafter?

A Yes.

Q Did you do any work on the 1968 return?

A No.

MR. MACDONALD: This is the second or third time this topic has come up. I think it is inaccurate to describe their work to certain tax returns. In this case the $37,000 items were received in '67 and not deposited until 1969 and the Carbide check called for performance and receipts during '68 and thus that issue extended into '68.

To that extent you were doing work that had relevance to '68, were you not?

THE WITNESS: To that extent, yes.

MR. TIGUE: That is very good redirect examination, Mr. MacDonald, but I think the witness said earlier he did not work on '68. That is why I want to give him an opportunity to tell me about that, and not you an opportunity.

MR. MACDONALD: If you had called his attention to that piece of paper you might have --

MR. TIGUE: I gave him the document.

THE WITNESS: THe purpose of that letter was to delay the trial. I was too busy in Los Angeles to come back. It wasn't for any other reason. I didn't talk the case over with Mr. Slack or anybody else.

MR. MACDONALD: I wrote a letter to Mr. Slack.

MR. TIGUE: I can swear you in next.

THE WITNESS: You had to write the letter to get permission --

Q There was a formal way --

A It was just to get the trial delayed so I could finish teaching a course there. I was running a pilot course on fiduciaries and I couldn't get back then.

Q It is perfectly clear to me. The question is, were you ever assigned a 1968 tax return to audit?

A I do not believe I was assigned a '68 tax return to audit.

Q Mr. MacDonald said the checks you were worried about that were not deposited in 1967, were in fact deposited in '68.

A It could be. My concern was it wasn't

the year I was --

MR. MACDONALD: All the records reflect deposits in '68, I believe.

Q The question is, did you ever determine that the payments in fact were deposited and reported in the subsequent year?

MR. MACDONALD: That is a question we have agreed to disagree on, I suppose. The fact determinations are manifested in many ways, the question is too inprecise to be fair.

Q Did you ever reduce to writing the conversation that you had with Mr. Leonard?

A No.

Q Did you ever put that in a report of any kind, other than the ones we have talked about this morning, as the activity report and fraud referral report?

A There is a possibility that at least part of that conversation was put in a report. Now, we used to, on the special program, that foreign bank account, have monthly status reports and we have made a diligent search, but we couldn't find it.

It may have been handed in in April or May of '69 when we asked him do you have any foreign bank

accounts, and I would have had to respond what he said and my response would have been on that status report.

On the same status report there may have been written other points of conversation that we had.

MR. MACDONALD: I want to show the witness document 08, and see if that refreshes his recollection as to what information the form required.

Look at the center box on that page.

MR. TIGUE: Would you identify what you are showing him?

THE WITNESS: No, this is not the monthly form. That is another form. That was a form, if you remember, that came with the case.

MR. MACDONALD: I suppose since all these are blank, why don't you limit your looking to that form.

MR. TIGUE: Form NAR 3-9087 is a report that you must make in connection with the project?

THE WITNESS: That is not the one. I was referring to the monthly status report.

Q Could you tell me what that form is?

A It would be a status report that would tell the project director what was happening with the case

and it was a printed form.

I don't have a copy of it. God knows we looked high and low for the darn thing.

Q Where are those things customarily filed?

MR. MACDONALD: Let's not --

MR. TIGUE: I can subpoena them.

A 120 Church.

MR. MACDONALD: When was the last time you saw a file cabinet containing such forms and tell us the location.

THE WITNESS: In May of 1970, just before we broke up Branch 1. That was the 13th floor, before we broke up Branch 1, Lou Byron's group. God knows where it went.

Q How long had you worked on the foreign bank project?

A My total involvement was from the summer of '68 until I left in 1970.

Q Is that the project where they provide mail watches?

MR. MACDONALD: Don't speculate.

A We were not given information as to how. We were given cases to do and we did them.

MR. MACDONALD: As you were informed, is one

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of the purposes that you are fulfilling in working such cases to develop audit techniques, attempt to develop audit techniques.

THE WITNESS: That was the main purpose.

MR. MACDONALD: To uncover foreign bank accounts of taxpayers?

THE WITNESS: Right.

Q You walked in out of the blue and said to Mr. Leonard "Do ycu have a Swiss bank account?" Is that right?

MR. MACDONALD: Don't argue with Mr. Tigue. You have described the conversation.

Q What was the basis for your inquiry as to whether or not he had a Swiss bank account?

MR. MACDONALD: I instruct you not to answer. This is clearly something you want to take up with the Judge in advance of trial, or else you waive your client's rights.

MR. TIGUE: I have brought it to the Judge's attention. You still persist in intervening in my examination and I maintain the objections I have previously stated and when this transcript is typed up today, I am going to give it to Judge Owen and continue my complaint.

MR. MACDONALD: Affidavit in response to your recent motion is attached to the Laski transcript also. I will show you Document 826, a document authored by another agent, Mr. Laski, and I will ask you if in general that form appears to be familiar to you as the form that you described to Mr. Tigue a few minutes ago.

THE WITNESS: Yes, this is the form.

MR. TIGUE: May I see it?

MR. MACDONALD: Yes.

MR. TIGUE: I saw on the second page of a document incidentally, which said a reward is to be paid or given and it had the name of somebody Walsh there. Would you care to let me look at it?

MR. MACDONALD: Again?

MR. TIGUE: When you asked me not to look, I didn't look any further and I didn't have a chance to read the whole document.

MR. MACDONALD: You look at this (handing).

MR. TIGUE: Thank you for small favors, but the document was the blank foreign bank project, whatever.

MR. MACDONALD: The statement reads:

"Please advise claims examiner Howard Walsh"

and a phone number, the agent assigned and the date this examination has started. "Claim for reward cases must be started within thirty calendar days after assignment."

And that unsigned note is dated June 6, '68 and directed to some supervisor and "Claim for reward case with evaluation form," and there is a blank form.

(Handed.)

Q Was this a reward case, Mr. Laski?

MR. MACDONALD: Don't bother characterizing it, Mr. Laski. That calls for hearsay information.

Q What is the function of claims examiners, within IRS?

MR. MACDONALD: Were you ever a claims examiner? Do you know?

A I don't know.

Q Do you know if anyone was paid a reward in connection with the Leonard case?

A No, I don't.

Q Did you have anything in your possession which indicated that Mr. Leonard in fact had a Swiss bank account?

MR. MACDONALD: Don't answer that broad a

question.

MR. TIGUE: Am I allowed to look --

MR. MACDONALD: No, you are not entitled to that.

MR. TIGUE: I am asking whether Mr. Laski had any indication that in fact Mr. Leonard did have a Swiss bank account.

MR. MACDONALD: Rumors?

Q I will start with rumors. What about the--

MR. MACDONALD: Don't bother answering that.

Q What about direct knowledge?

MR. MACDONALD: That is as inprecise and misleading. Do you mean did this witness ever see a bank statement?

MR. TIGUE: All right, let's ask that one.

A From Mr. Leonard?

Q Yes.

A No.

Q Did you ever see any copies of any mail from a Swiss bank account for Mr. Leonard?

A No, I didn't.

Q Any other documents which had Mr. Leonard's

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name on it, from a Swiss bank account?

A No, I didn't.

Q Or a number which was assigned to him?

A No, I didn't.

Q Have you seen any documents which would indicate he did have a Swiss bank account?

MR. MACDONALD: Like interagency reports, perhaps?

MR. TIGUE: Any documents.

MR. MACDONALD: Please tell me the basis of your entitlement of --

MR. TIGUE: I am asking what he saw.

MR. MACDONALD: Are you limiting it to banking documents?

Q Have you seen any banking documents that have Mr. Leonard's identification, name or number on it?

MR. MACDONALD: Foreign?

MR. TIGUE: Yes.

A No, I have not.

Q Have you seen any other documents?

MR. MACDONALD: Don't answer that question until we go to Judge Owen. It's too broad. It may ask for an interagency report.

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Q Other than the bank records themselves, other than interagency reports, have you seen any other documents?

MR. MACDONALD: I am going to instruct you to exclude any documents you have seen within the last two months in the course of working with me and limit it to at or about the time of the audit.

A No, I haven't. Well, the Australian one.

Q I am not talking about that. Whatother documents have you seen or heard of in the last two months which would indicate either there was or was not an account?

MR. MACDONALD: That is the very reason that the Second Circuit is going to hold you are not entitled to probe into trial preparation stages with agents.

MR. TIGUE: Don't you say to witnesses, "What did Mr. Tigue talk to you about"?

MR. MACDONALD: I have seen one of your witnesses and you have cut me off, whatever her name was, was instructed not to answer.

MR. TIGUE: You chose not to have a court reporter there so let's not fight about that. That is not altogether correct. You asked her one question

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about a letter which she typed up between Mr. Leonard and her lawyer and I thought that was protected. Indeed, I think Judge Owen agreed with me in court last Friday on that. Please don't put the record in a fuzzy condition.

MR. MACDONALD: The question was whether she typed it up and you wouldn't let her identify --

MR. TIGUE: Judge Owen agreed with me in court last Friday.

MR. MACDONALD: The Judge sustained you, which is the proper way to proceed in this case.

MR. TIGUE: That is how I intend to proceed and have proceeded.

Q The referral report says "During the years '66 and '67 taxpayer also diverted funds to a corporation account, Leonard Process, Inc."

MR. MACDONALD: Is that the handwritten '67 that is interlineated above the line?

MR. TIGUE: I am reading from the report.

MR. MACDONALD: In the handwritten version of this report I thought that was '69 although I really can't tell. Apparently the typist interpreted it as '67.

Q What do you know about that phrase "During

the years '66 and '67 taxpayer diverted funds to a corporate account, Leonard Process Co., Inc."? Do you know anything about that?

A No, it is hazy. I couldn't give you an answer now. Mr. Singer took the case over after I did. I don't know what he did.

Q What about -- Mr. Singer based his report I gather in part on what you told him?

A I told him what I had done. When I left New York I didn't remember a thing. I don't know what Mr. Singer did. I had a couple of unfortunate tragedies after, so I didn't stay in contact with the District.

Q You said he had tragedies or --

A I did. My father had died.

Q It says "Taxpayer also cashed checks." Did you supply any information for that?

A I don't remember that.

MR. MACDONALD: I direct your attention to the schedule on the following page where there is a notation of the taxpayer having cashed checks totaling $2,000, which is a net that goes to the Union Carbide 1966.

Q This is 0014. That is your handwriting on that page?

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A No, it is not mine.

MR. MACDONALD: Does it look like Singer's handwriting?

THE WITNESS: It could be. It's not mine.

Q That does not refresh your recollection about cashed checks?

MR. MACDONALD: Why don't you help him out. There were three checks in '66, one of which was a $10,000 Franklin National Bank endorsement and the other two were $1,000 items each of which bore Simplex names on their face and Mr. Tigue has copies of both of them, Exhibits 5 and 6.

MR. TIGUE: I am asking what Mr. Laski's recollection is.

MR. MACDONALD: It is fair to show him the document which you have in your possession.

Q Do you have any recollection about the cashing of checks?

A It is vague.

Q Then the last phrase, "Endorsed checks and made payments direct to third parties." Did you supply the basis for that information "Endorsed checks and made payments direct to third parties"?

A I probably received the checks. I didn't

follow up the check. Bernie Singer followed the checks up.

Q I take it none of the schedules attached to this report are yours, is that correct?

A This is Schedule 1.

MR. MACDONALD: Referring to 397.

A And the analysis of income is mine here, 398.

Q 397 is yours?

A Yes, and this is my handwriting, 398, and that's my handwriting.

Q 399.

A And this.

Q 214?

A Yes, and this is mine.

Q 802, it looks like.

A Yes, and 803 is my writing and whatever this number is.

Q It looks like 809 or 808.

A And this is my handwriting.

Q Let me just go back to the first one which is your handwriting. Starting with 397, that is your handwriting, the first one you identified?

A Yes.

Q Did Mr. Leonard have a regular set of books that you recollect?

MR. MACDONALD: I object to the form. Why don't you ask him to describe what if any recollection he has.

Q Describe whatever records were shown to you of the Leonard Process Co. or Mr. Leonard.

A For 1965 and '66, there were looseleaf pages put together that were in some semblance of journal ledger hybrid, that wasn't a customary set of books; just ledger paper and forms. It was very unprofessionally done.

Q Number 803, is that your handwriting?

A Yes.

Q According to the -- is that "Per books"?

A Right.

Q Mr. Leonard's books?

A Yes.

Q It shows $291,000 income for Union Carbide.

A Right.

Q The corporation books showed --

A No, that's per the letter confirmation I received.

Q Does it say "Confirmation" or "Corporation"?

A Confirmation.

Q Did you take any steps to determine the difference of what was reported on the books and what was reported by the confirmation?

MR. MACDONALD: In addition to the requests for the checks?

MR. TIGUE: Yes.

A No. I personally did not. The transfer was transferred to Mr. Singer. I was leaving for Los Angeles.

MR. TIGUE: Mr. MacDonald, do you have a copy of that confirmation?

MR. MACDONALD: I think you are entitled to it as 3500 material for UCC witnesses. All right. (Handed.)

There is a cover letter that goes with it but you are looking at the confirmation schedule which was described by the witness earlier as having been received in October or November.

Q Did you receive that, the confirmation from Union Carbide on or about October 9, 1969?

A It was received by the Internal Revenue Service.

Q It would ultimately come to you, wouldn't

it?

A If you're asking me if I opened it on or about that date, October 9th, I don't believe so.

Q Within a month or so?

A It's hard to say. I was involved in other activities. As the mail was coming in, it was sitting. I couldn't get to it at that point.

Q You were busy with other cases?

A Yes, and assignments.

MR. MACDONALD: You don't have any recollection one way or the other, is that the case?

Q Whenever you received it, did you come back to Mr. Leskowicz or anyone else to determine the difference between what was on the books and what was in the confirmation?

MR. MACDONALD: That's argumentative.

A I don't remember.

MR. TIGUE: May I see the original, again? I just want to copy some dates down.

For the moment, Mr. Laski, I don't have any further questions. I thank you for coming today.

When I say for the moment, I think there are some outstanding matters between Mr. MacDonald

and I and Judge Owen. I gather you will be around for the next few days. Thank you, Mr. Laski.

(Time noted 1:05 p.m.)

_____

Subscribed and sworn to before me

this _____day of _____1975.

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, HERBERT H. PROKOP, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That MORTIMER LASKI, the witness whose deposition is hereinbefore set forth, was duly sworn by me, and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action, by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of January 1975.

HERBERT H. PROKOP

FILE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

vs. : 74 Cr. 599 (RO)

JACKSON D. LEONARD, :

Defendant. :

----------x

U.S. DISTRICT COURT
FILED
MAY 1 1975
S.D. N.Y.

January 3, 1975,
10:20 a.m.

Deposition of JOSEPH J. TRAGNA, and continued deposition of ROBERT SCHULMAN, taken by defendant pursuant to agreement of counsel, at Room 301-B, United States Court House, Foley Square, New York, New York, before Leon Zuck, a Certified Shorthand Reporter and Notary Public of the State of New York.

PAUL J. CURRAN, ESQ.,
United States Attorney
For the government
BY: W. CULLEN MAC DONALD, ESQ.,
Assistant United States Attorney

KOSTELANETZ & RITHOLZ, ESQS.,
Attorneys for defendant
80 Pine Street
New York, New York
BY: JOHN J. TIGUE, JR., ESQ.,
of Counsel

- -

J O S E P H J. T R A G N A, called as a witness by defendant, being first duly sworn by the notary public, testified as follows:

EXAMINATION BY MR. TIGUE:

Q Mr. Tragna, as you know, my name is Tigue. I'm the attorney for Jackson Leonard.

You are employed by the Internal Revenue Service, are you not?

A Yes, sir.

Q Are you a revenue agent?

A I am an appellate conferee.

Q When did you become an appellate conferee?

A In July of '74.

Q What was your position back during 1971?

Were you a revenue agent?

A In '71 I was a field agent, right.

Q Revenue agent?

A Revenue agent, right.

Q Did there come a time when you were assigned to the Leonard case?

A Yes. I received the case from Bernie Singer.

Q When was that, sir?

A What was the date?

Q Yes.

A I'd have to look at my activity records. I received the case February 16, 1971.

Q Are you refreshing your recollection from your chronological activity report or record?

MR. MAC DONALD: Let the record indicate that I let the witness read the first line of page 590 and the first line only.

MR. TIGUE: I gather you will not permit me to look at that, is that correct?

MR. MAC DONALD: When the judge rules it is appropriate, if he does, you can look at that line.

Q When did you transfer the case to another

agent, the Leonard case?

A The case was transferred in May, May or June of '72.

Q So you were on the case one year and three months, one year and four months, about?

A That's about right.

Q Was that assigned to Mr. Alleva or Mr. Schulman?

A Well, I assigned my case to another internal revenue agent.

Q Oh, that's right. I'm sorry. That would be Mr. Reiner?

A Yes.

MR. MAC DONALD: For precision's sake, I will show the witness another entry on page 585, a single entry, so he can give you the precise date of the transfer.

A This is the date, June 2nd is the date that the case was decided to be transferred.

MR. MAC DONALD: To Reiner?

THE WITNESS: To Mr. Reiner.

Q 1972?

A Yes.

Q Have you been asked to be a witness at

the Leonard trial, Mr. Tragna?

A Yes, I have been.

Q Let me see now. Were you the agent who referred the Leonard case to the Intelligence Division?

A No, I wasn't.

Q Do you know who was?

A I believe Bernie Singer.

Q Who worked with you on the case? Was there a special agent on the case when you got on it?

A Yes, Norman Levy was the special agent.

Q Did you work under his supervision and control?

A Yes.

Q During the course of the investigation did you contact people outside the government?

A No, I did not.

Q Obviously you contacted Mr. Leonard, did you not, and Mr. Leskowicz?

A I thought you meant other than the taxpayer's representative.

Q You did not contact banks or brokerage houses?

A No, I did not.

Q Did there come a time when you met Mr. Leonard?

A Yes, I met Mr. Leonard three times.

Q When was the first time?

A The first time was in May, '71.

Q What was the occasion for your meeting him then?

A We had certain discrepancies with the Union Carbide transactions that we wanted to clear up. The special agent arranged for the appointment.

Q Are you sure of the day? Could it have been June 16, 1971? I'll show my copy, if you want, but mine is marked up.

A That's right, it is June 16, 1971.

Q And you had a great many things that you discussed with him in addition to Union Carbide, is that right?

A That's correct.

Q The second time you met him was that on July 28, 1971?

A That's correct.

Q When was the third time?

Iza Tragna

A The third time was May 4, 1972.

Q Was that when you were with Mr. Reiner and Mr. Schulman?

A That's right.

Q Did you ever have a copy of the UCC contract, Union Carbide Corporation contract?

A To the best of my knowledge, we never had the copy of that contract.

MR. MAC DONALD: Indeed, were you refused such a copy on July 28, '71?

MR. TIGUE: Why don't you refer him to the appropriate sheet.

MR. MAC DONALD: Let the record reflect I am directing the witness' attention to the third page of his and Levy's report of July 28, '71, and to that sentence which begins the first full paragraph on that page.

A That's right, we were refused copies, both the Union Carbide and the Treadwell contracts, at that point. It was explained to us that the taxpayer had previously furnished copies.

Q To Mr. Laski, right?

A To Mr. Laski. However, our files did not contain such contracts.

Q And Mr. Leskowicz took the position that you really ought to go back and look over the file because all these documents had been provided, right?

MR. MAC DONALD: Instead of telling him what position was taken --

MR. TIGUE: He said that in words or substance, did he not?

A Yes, that's what he said to us.

Q And you two had a bit of an argument about it?

A Well, we didn't have an argument. We stated that we did not have copies of these contracts. We did have hand transcripts that the prior agent made of the contracts which would reinforce our thinking that the copies of the contracts were never made available.

MR. MAC DONALD: By "transcript" you mean excerpts from --

THE WITNESS: I mean handwritten transcripts in longhand that the agent made of pertinent sections of the Union Carbide contract.

Q Have you ever seen a copy of the contract?

A No, I have never seen a copy of the

contract.

MR. MAC DONALD: Mr. Tigue may or may not be including the last several weeks in this office.

Q The question is "ever."

A Yes, I saw a copy of the contract.

Q When was the first time you ever saw it?

A I --

MR. MAC DONALD: If you remember.

A It was in this office. I think you had received the contract from Union Carbide and I didn't look at it. I just glanced through it.

Q At any rate, before you saw this contract in the last few weeks you never saw it at any time in your life before, before Mr. MacDonald showed it to you, is that right?

A There are two pages on one of the work paper files that were checked out and would seem to be part of that contract. Those two pieces of work paper -- those two copies are pages of the contract. I had no way of knowing at that point that those were Union Carbide contracts or portions of Union Carbide contracts.

Q Frankly, I did not understand the last answer, Mr. Tragna.

MR. MAC DONALD: I didn't hear it all.

A In one of my work paper files, at the end of the work paper file, there are copies of two pages of a contract and --

Q Where did you get those?

A Where did I get them?

Q Yes.

A I assume they must have been in the file when I received the file. I received the case from --

Q Mr. Singer?

A Agent Mort Laski.

Q I thought you said you got it from Mr. Singer; no?

A I got the case from Mr. Singer, but Mr. Singer really never worked on the case. So it had been probably supplied to Mort Laski.

MR. MAC DONALD: Let's not guess where things came from or how, although if you have a best recollection you are certainly obligated to give it.

A I really don't remember where it came

from. I assume they came from Mort Laski.

MR. TIGUE: Can I take a look at the contract.

MR. MAC DONALD: These are the two pages I mentioned to you before that you asked me for during pretrial discovery of documents given. These were the two pages. I now checked them out and Tragna has a recollection as you just heard. He put them into the work papers but he can't recall when and from what source.

I will provide you with copies of the precise two pages. If you want a break now I will do it now.

MR. TIGUE: No.

Q At any rate, it was you, Mr. Tragna, who put copies of those two pages in your file?

A I believe it was me.

Q At these interviews of Mr. Leonard did you take any notes during the course of those interviews?

A Yes, I did. I took notes on June 16 and July 28, '71.

MR. TIGUE: Are those the ones I already have, Mr. MacDonald?

MR. MAC DONALD: I think so. Look at them. That document and that document.

MR. TIGUE: Yes, those are the ones I have.

Q What about May, 1974. Did you take any notes during that interview?

A May, '74?

Q '72. I am sorry.

A May, '72. I don't believe I did.

Q You just have no recollection or you are sure you did not?

A I don't have any recollection of taking notes.

Q If I could, I would like to go back to the first meeting in June of 1971.

Can we turn to page 3, please. I think that's the first reference to the Union Carbide.

A Page 3 of --

Q Of your handwritten notes. Of the note, the report that you signed but was written by Mr. Levy, I guess.

A Yes.

Q Those checks which are mentioned there, three checks totaling $12,000, did you determine

whether or not those checks were included in income in 1966 or any other year?

A We could not locate these checks in income.

Q In other words --

A Which was the reason we were presenting questions with regard to these three checks.

Q Did you subsequently determine whether or not they were included in income or not?

A We have been unable to determine that they were included in income.

Q Until this day?

A Until this day.

MR. TIGUE: Is that the same thing as they were not reported as income? When you say, "We have been unable to determine that they were included in income," is that the same thing as saying: from his bank statements it appears that they were not included and reported as income?

THE WITNESS: Up to the time that I left the case the determination was that these checks were not reported in income.

Q Did you determine whether or not they were part of a $15,000 miscellaneous item on his

return for that year?

A The taxpayer tried to explain at one point --

MR. MAC DONALD: Don't tell what the taxpayer said. Mr. Tigue wants your best recollection on whether or not, as he put it, you determined that they were reported as part of a $15,000 miscellaneous income item.

A No, that was never determined.

Q Do you know what that $15,000 item of income was?

MR. MAC DONALD: I wonder if --

A I don't know what the $15,000 item of income is you are talking about.

Q And you never learned, as far as you recollect, during the investigation?

A There was never a specific $15,000 item of income that I tried to trace through; reported as income.

Q Can you tell me how many hours you spent on the Leonard case up through May of '72?

A Do you want it approximately?

MR. MAC DONALD: That question we will submit to Judge Owen's decision.

MR. TIGUE: Are you directing the witness not to answer? The witness should be clear.

MR. MAC DONALD: I am referring you to the court if you want to press this matter further.

Q Do you want to answer the question, Mr. Tragna?

MR. MAC DONALD: You don't really have to engage in a colloquy.

MR. TIGUE: I don't want to engage in a colloquy. I want an answer. If there is no answer I want to know why.

MR. MAC DONALD: You don't have to. The record will speak for itself in that respect.

Q Did you talk to Mr. Leonard at the June meeting about the checks from UCC?

A Yes, we did.

Q Can you tell me what you can recollect about the conversation? What he said to you and what you said to him?

A The special agent, Norman Levy, presented the taxpayer with copies of three cancelled checks totaling $12,000. They were made out from Union Carbide --

Q I haven't made myself clear. I am referring to the next matter, if you look at the bottom of page 3 of your memorandum and Mr. Levy's memorandum. It says, "With reference to Union Carbide checks endorsed," and so forth. Those are the checks I'm referring to.

These are the checks that were turned over to Treadwell, from UCC to Leonard to Treadwell. Can you tell me the conversation about those checks?

A We asked him to explain why Union Carbide checks had not been reported in income, and his explanation was that they had -- that he had on the job a contractor, Treadwell, who performed work and that he merely received these checks from Union Carbide and endorsed them over to Treadwell, and that he did not have any -- did not earn any income on the transaction.

Q Did you determine whether that was true or not?

MR. MAC DONALD: Once again, I don't know if it is fair to compress an entire investigation into a single, sole determination. I don't know what purpose it serves by shortcutting what it was that was said in this report and what it was

that was done thereafter.

Q Did you determine whether or not the checks from Union Carbide were included in income?

A Certain checks from Union Carbide were not reported as income.

Q And --

A The explanation given was he endorsed them all over to Treadwell and he did not have income on this situation. Whatever he got from Union Carbide was the same amount he owed to Treadwell for performing the services.

Q Did you determine whether there was a check from Union Carbide to Leonard and from Leonard to Treadwell in the same amount?

A No. The check from Union Carbide to Leonard was merely endorsed and turned over to Leonard.

Q So did you determine that he did not report that as income?

A Yes.

Q And did you determine that he did not take an expense for the amount paid over or the amount transferred to Treadwell?

A Yes.

Q During this discussion in June of 1971 was there any discussion about a 10 per cent override which was paid under the UCC contract?

A No, I don't recall any discussion about a 10 per cent override.

Q I am now on page 4, Mr. Tragna. I have them separated here as to topic. The next one begins, the first full paragraph, reference to the three Union Carbide checks. Would you take a minute to read about five lines, please.

A All right.

Q Could you tell me what the conversation was with respect to those three checks?

A Well, we noticed that three Union Carbide checks, I believe each was in the amount of $37,000 were not reported as income by Mr. Leonard.

MR. MAC DONALD: In '67?

THE WITNESS: In '67. And we asked him to explain these checks. Explain why they were not deposited. And he showed us that they were deposited in 1968.

Q All three checks, right?

A All three checks.

Q What else did he say about it.

A We asked him what the reason for the delay was. "The checks were made out in 1967. Why should they have been deposited in 1968?

At that point he said he was having litigation with Union Carbide and that they had held up these checks and he had not received them until '68 or shortly before and deposited them.

Q Did you determine whether that was accurate or not?

MR. MAC DONALD: Once again, it is the kind of determination --

MR. TIGUE: I don't understand.

MR. MAC DONALD: You are asking him if he made some further investigation of third parties or internal records. I guess in order to base a determination.

MR. TIGUE: First of all, he says yes or no if he determined.

MR. MAC DONALD: Why don't we defer this question.

MR. TIGUE: I don't want to defer it. I want an answer.

MR. MAC DONALD: Are you able to answer that question?

THE WITNESS: What's the question?

Q Were you able to determine whether or not there was litigation or there was some reason for the delay in the receipt of these checks by Leonard?

MR. MAC DONALD: The question is were you able to determine whether Leonard lied to you or not with respect to his statement that there was some litigation, not other reason for the delay.

MR. TIGUE: All right, let's say litigation.

A I had the feeling that he was lying to us because I don't believe at that point that Union Carbide would make checks out and predate them.

Q What did you do about that feeling?

A I think of things in terms of as an accountant.

Q I do too. But the question really was what did you do to determine it.

As a revenue agent you base your conduct more on feelings and activities, right? What did you do?

MR. MAC DONALD: Don't answer that.

You are asking for his investigative activities in making the determination, and that's really the area --

MR. TIGUE: He just said I thought he was lying. I'm trying to find out whether or not he determined whether the statement was true or not. You apparently were prepared to let him answer that because you knew what the answer would be.

MR. MAC DONALD: It is an irrelevant question anyway. We will just refer you to the judge and I will tell Mr. Tragna he need not answer that question unless Judge Owen tells him to.

MR. TIGUE: I think that's a better way to proceed. I think the record should be clear it is you who is telling him not to answer.

MR. MAC DONALD: It is you in the sense if you go to the judge or if you refrain from going to the judge, it is your option.

MR. TIGUE: All I know is, I am asking a question and I don't get an answer, and it is because you say something between. The reason I object to it is because when I bring witnesses here I let you ask any questions you want

to.

MR. MAC DONALD: You haven't yet brought a witness to me. I hope to see today the first. I would like to see your client, who I understand is not and will not be tendered, and I would just interject that if we make an issue at trial about relative cooperation, if it becomes relevant whether or not Mr. Leonard has cooperated in any way with the later phases of the investigation.

MR. TIGUE: I intend to make an issue of it. If you want to bring to the jury's attention that Mr. Leonard has exercised his constitutional privileges, you will have to suffer the consequences.

MR. MAC DONALD: I will seek judicial sanction for doing that.

Q Did you talk to anybody at Union Carbide after this June 16, '71 meeting?

A No, I did not.

Q Did you review any documents from Union Carbide?

A Are you thinking of anything specifically?

Q Correspondence, letters, contracts, purchases --

A We had correspondence from Union Carbide that I may have referred to after this meeting.

Q What was that?

MR. MAC DONALD: Actually, this is another time when I will defer to Judge Owen's ruling rather than allowing an answer.

Q Did you ever interview Mr. Mitchell from Union Carbide?

MR. MAC DONALD: Don't bother answering that.

Q What about your conversations with your fellow-employees at the Internal Revenue Service? Can you tell me what conversations you had with them with respect to the Leonard case?

MR. MAC DONALD: Mr. Tigue is asking that for the sake of completing his record.

Don't bother answering about IRS procedures and communications.

Q We will move on to the next topic on the same page, the bank account at the First National City Bank.

Let me skip that for a minute. Can you go to Page 5 for a second? Down toward the bottom there there is discussion about a $15,000 item.

Can you tell me, as best you recollect, what was said on that subject?

A The prior agent, Mortimer Laski, had done a detailed analysis of the taxpayer's bank account that showed bank deposits, and one of the

items of deposit -- I hesitate to use the word "income" -- one of the items shown as a deposit was $15,000, and the taxpayer was asked to explain the source of the $15,000 deposit.

Q Without looking at the statement, do you recall what he said?

A He said that he had taken out a loan from the First National City Bank and that the $15,000 was the receipt of the loan.

Q Did you determine whether that $15,000 deposit was included in income in 1966?

A I did not determine that it was in fact.

Q Did you determine that there was any relationship between the $15,000 that was deposited in 1966 and the $12,000 which we spoke about on Page 3 of this memorandum?

A To my knowledge there was absolutely no relationship.

Q But you don't know whether the $15,000 was included in income or not?

MR. MAC DONALD: That's argumentative. You need not answer it. You already have answered that question.

You see, as soon as you say you made a

determination, Mr. Tigue will argue about whether it was an accurate one.

Why don't we limit ourselves to what was said and what you said, and maybe we can find out some facts?

MR. TIGUE: The fact I am trying to determine is was the $15,000 that is referred to on Page 5, was there included on the 1966 tax return for Jackson Leonard that $15,000?

MR. MAC DONALD: Let's not shortcut matters.

When was the last time you saw the '66 tax return, months ago?

THE WITNESS: I haven't seen it since I left the case.

MR. MAC DONALD: When was the last time you saw the schedules which underlie that return, months ago?

THE WITNESS: I haven't seen it since I left the case.

MR. MAC DONALD: Do you have any recollection about what determinations were made in that respect? Do you have any recollections about what determinations you made?

THE WITNESS: No. There were a great many items of income reported and a great many discrepancies we noted.

At this point, without going back to the original workpapers, I would just be guessing.

Q Would you like to take a minute to look at the workpapers to be able to give an accurate answer?

MR. MAC DONALD: The '66 year is only relevant to this matter, obviously, insofar as Mr. Leonard lied about the use he put to those three checks. To that extent you have refreshed your recollection from the materials, haven't you? Haven't you read the materials on Mr. Leonard's prior false exculpatory statements on the '66 three checks? You have?

THE WITNESS: I've read the reports.

MR. TIGUE: Mr. MacDonald said you should answer yes.

THE WITNESS: I've read our reports that we brought up at the time of the meetings.

Q In what respect did he lie on the $11,000?

A I don't want to say he lied or he didn't lie. He made certain statements to me. That's

all I want to testify to.

Q Well, Mr. MacDonald just suggested a long answer and you said yes. One of the things he suggested was that he lied with respect to these and I would like to know how he lied or what the lie was.

MR. MAC DONALD: Why don't we move on? Now we are going backwards to '66.

MR. RIGUE: I don't want to move on. I would like an answer to my question.

I really do view your interjecting, interposing yourself as preventing me from properly preparing my defense in this case. The witnesses are here prepared to answer the case and you, the prosecutor in this case, intervene and say, "Don't answer."

I think that's improper and I do intend to bring it to the Judge's attention.

MR. MAC DONALD: If you ask it in a proper form I won't object. But when you compress hours of work into a single verbal determination, that's unfair.

If you ask Mr. Tragna what he recalls was the countervailing evidence concerning those

three checks, I'll let him answer.

Q What was the countervailing evidence with respect to those three checks?

A I don't understand what you want.

MR. MAC DONALD: What other information from the checks themselves, for example, or from other sources, did you have which indicated that those checks had not been, as Leonard said, endorsed over to Treadwell?

THE WITNESS: Well, the last part you were questioning me about the $15,000 deposit into his checking account.

Q Page 3, middle.

MR. MAC DONALD: Referring back to the three instruments.

THE WITNESS: The three Union Carbide checks?

MR. MAC DONALD: Yes.

Was there something on the face of the first check, 5/27/66, which indicated it had been cashed and not endorsed over to Treadwell?

THE WITNESS: Yes, there was a certain bank stamp that the special recognized as symbols that the check was cashed.

Q What about the middle check for $10,000 which says to the right, Franklin National Bank endorsement?

MR. MAC DONALD: Was that check endorsed --

MR. TIGUE: That check was signed by the taxpayer.

Q It was not cashed, right?

A That's right. To our knowledge, that check was not cashed. It was deposited in the Franklin National Bank.

Q In whose account?

A I have not been able to determine whose account that went into.

Q And the third check there was also cashed according to the check itself?

A Yes, that's right. The two $1,000 checks were cashed and the $10,000 check was signed by Mr. Leonard.

MR. TIGUE: I do not have my files. The January '68 UCC check for $37,000, I would like a copy of that.

MR. MAC DONALD: I will make a check. I don't have it either.

Q During the course of the June meeting with

Leonard in 1971, did you request any documents to be produced?

A At the June meeting?

Q Right.

A Well, Mr. Leonard explained certain discrepancies as being checks that were endorsed directly over to Treadwell, and we asked him for documentation on this.

Q Where is that in your memo?

MR. MAC DONALD: To shortcut matters, on Mr. Tragna's notes of the meeting on Page 2, I'm referring him to Item No. 3. 8 sub 3.

A June 16th.

Q The documents listed on your notes for June 16th, are those the only documents that were requested, or were there others?

A I'd have to look at the entire memo again. I believe -- I'd have to look at the memo to see if there was anything else.

MR. MAC DONALD: Why don't you give your best recollection of what your request was instead of limiting it to a note entry, unless that's your best recollection? What is your best recollection of the documents that were requested?

THE WITNESS: My best recollection was that we asked for documentation on the Union Carbide Treadwell, and then there were also a category, that he called accommodation purchases, from Davidson Chemical.

We also asked for documentation on it at that point.

Q Did you ask for a copy of the contract?

MR. MAC DONALD: To the extent that the request for documentation might be misinterpreted as not requesting that? Documentation includes all documentation to the ordinary listener.

Q Was Mr. MacDonald present at this meeting?

MR. MAC DONALD: You don't have to answer that.

Q If you look at Page 2 of your notes, which you number 94 in the upper right-hand corner, were those the UCC documents you asked for?

MR. MAC DONALD: That's the same question. You already answered it.

MR. TIGUE: I don't understand what he said.

MR. MAC DONALD: You are arguing with the witness' answer. His best answer is a broad

documentation request --

Q Where is that in your notes?

MR. MAC DONALD: You don't have to argue with Mr. Tigue in that respect.

Q Did you make a note of asking for a copy of the UCC contract?

MR. MAC DONALD: That's the same question. It's an argumentative question.

Q Did you make a note --

MR. MAC DONALD: The form is objectionable.

Q Could you show me --

MR. MAC DONALD: You don't like the answer, the documentation might include the contract.

Q Where did you write anything in your notes about the UCC contract?

A Do you see Item 8 on page marked 94?

Q Yes. I can't read it very well.

It says Union Carbide discrepancies were summarized and substantiated, right?

A That's right.

Q What does the next one say?

A 1. Subcontract Treadwell;

2. Simply endorsed and passed on; and

3. You will get bills.

Q Did you ask him -- did you say to him in words or substance, "Mr. Leonard, I would like to see a copy of the UCC contract"?

MR. MAC DONALD: Don't bother to answer that question.

Q Do these notes include all the requests you made of him, Mr. Tragna?

MR. MAC DONALD: Of course not.

MR. TIGUE: You weren't there. How do you know?

MR. MAC DONALD: I object to the form. This is in an inappropriate form for the examination. If you want to get the facts, ask for the facts.

Q The fact is, did you say to Mr. Leonard in words or substance, "I would like to see the Union Carbide contract between you and Union Carbide"?

MR. MAC DONALD: What's your best recollection?

And you are limiting this to June 16th, right?

MR. TIGUE: Yes.

A Is this the type of situation where you are answering in one word or less, or can I explain?

Q Please; sure, explain it.

A It's always been my experience as an agent that I never request certain items of information to document a point, because I don't know what the underlying documents are. I request substantiation, and the taxpayer is the one that has knowledge of the situation and he is the one that can best determine what to offer in substantiation.

Over here I only made copies -- he said he would get bills. Certainly that wouldn't be complete documentation on that particular subject. I do not recall specifically asking for a Union Carbide contract.

Q The next meeting you had was in July, is that right? Am I right on that?

A That's right.

Q July 28, 1971; is that right?

A Yes.

Q Did you work on the case between the first meeting and the second meeting?

MR. MAC DONALD: Don't bother answering the question.

Q On the July 28, 1971 meeting, without

reading the memorandum, do you recall what happened at that meeting?

A Yes. The same questions came up again about the Union Carbide checks.

MR. MAC DONALD: You have read the memo recently?

THE WITNESS: Yes.

MR. MAC DONALD: Indeed, a few questions ago you have read the memo. I don't know if Mr. Tigue wanted to leave the impression you hadn't read it in some time.

Q Was Mr. Leonard given any warnings at this meeting?

A Yes. He was given a warning as soon as he was there.

Q Toward the bottom of Page 1 you refer to a settlement agreement at the last meeting.

The last meeting would be the June meeting, is that right? There was no other meeting?

A Yes.

MR. MAC DONALD: Settlement agreement? Submitted.

MR. TIGUE: It's a copy of a settlement agreement.

MR. MAC DONALD: Will you show me what line you are referring to? Oh, British Hydrocarbon settlement agreement, all right.

Q The last meeting that you are talking about there was the June meeting; is that right?

A That's right.

Q You had no meetings with Mr. Leskowicz other than the three you have already mentioned; is that correct?

A That's right.

Q On Page 2, please, I see you talked about W. R. Grace & Company, sales and purchases.

Did you find out whether or not those deposits were included in income?

MR. MAC DONALD: That's not relevant to this case and there is no use answering it unless you tell me why it's relevant.

MR. TIGUE: Well, it seems to me that the whole issue of wash sales, what ought to be included in gross income and what ought to be excluded, is the very heart of the case, and I can't imagine anything that could be more relevant.

MR. MAC DONALD: The revenue agents' analyses of Leonard's determinations are not

relevant on that score. What Leonard decided to report and didn't report is what counts, not what the agents were able to discover from his incomplete records.

MR. TIGUE: You see, I am trying to prepare a defense here. While you might want to apply the rules of a courtroom, it seems to me when you interview a witness ahead of time you ask him many, many questions, some of which are relevant and some of which are not under the rules of evidence.

I object to your imposing on this interview any rules of evidence.

When you interview witnesses and when Mr. Tragna interviews witnesses, he asks an unbelievable number of irrelevant questions because he doesn't know in the beginning, and I don't know when I interview him what's relevant and what isn't.

MR. MAC DONALD: If you wanted to have an interview that was not going to serve as the basis for prior consistent or inconsistent statements, then you get different treatment than the interview we are now having. If you ask a leading question which has an objectionable form and in an irrelevant area, you are only doing it to impeach

Mr. Tragna if he were to depart from that answer at trial, and you are going to areas where he hasn't refreshed his recollection.

It's not fair to use leading questions in secondary areas.

MR. TIGUE: You should understand that the purpose of this interview is not to generate inconsistent statements.

MR. MAC DONALD: Will you stipulate that none of it will ever be used at trial for that purpose?

MR. TIGUE: I certainly will not.

MR. MAC DONALD: I have to be concerned.

MR. TIGUE: You may be concerned.

The purpose of this interview is to determine what the facts are as best I can defend my client, and --

MR. MAC DONALD: You should ask questions designed to get the facts and not make --

MR. TIGUE: But you determine what's relevant and irrelevant.

MR. MAC DONALD: If you ask him what he remembers about the wash sales, then you will get the witness' recollection, and ask him what

his state of refreshment is.

You didn't ask him that. You asked him if he determined that wash sales were proper in the year '67. That isn't designed to give you any facts.

MR. TIGUE: I must say I am completely confused by your view of what the word "determination" means.

Q What did you do about these Washington sales, Mr. Tragna?

A I think at this point the taxpayer was keying off amounts received with purchases from Davidson Chemical Company and the checks were not deposited in his account from the customers and the Davidson Chemical purchases were not shown, and he made the point that the amount he received as income he expended as expenses for these purchases.

We noticed there were minor discrepancies in amount there. They didn't seem to be too big, the differences between what he received and what he had to pay out with regards to these specific items.

Q When you say it was not recorded, where

was it not recorded?

A It was not on the taxpayer's records.

Q Would that include his checking account?

MR.MAC DONALD: What's your best recollection?

THE WITNESS: I think they were. I think that the cash payments were on his checking account.

Q And the deposits as well?

A I really --

Q You don't remember?

A I don't remember.

MR. MAC DONALD: The last time you looked at the workpapers underlying this issue was two years ago?

THE WITNESS: Right.

Q Mr. Leonard did not have a formal set of books, is that right?

A That's right. He did not.

MR. MAC DONALD: That you were ever shown? You don't know what he had in his office --

THE WITNESS: I was not aware of a formal set of books that Mr. Leonard kept for those -- '66 and '67.

Q Did you work on the investigation relating to '68, the year 1968?

A Just perhaps a day, a short period of time.

Q Is that when you worked with Mr. Reiner?

A That's when Mr. Reiner came into the case.

Q On Page 2 there you asked for some records. Tell me which records you asked for. Tell me what the conversation was relating to the request for additional records.

A The special agent asked Mr. Leonard for his records so hey could check out the Union Carbide and Treadwell situation and what he called the accommodation sales with Davidson Chemical.

Q I notice you are reading from the statement.

Do you recall, independent of the statement, what was said?

MR. MAC DONALD: I don't understand that.

MR. TIGUE: He is reading as he goes along.

Q My question is, Mr. Tragna, if you don't look at the paper, and you look at me, do you remember the conversation? Or you can look at somebody else.

MR. MAC DONALD: The question is not so much do you remember, but what is your best recollection? And please give it to me.

Is that what you mean?

MR. TIGUE: I like my own questions. I like the way I ask questions.

MR. MAC DONALD: If you want to elicit information, it's fair to ask a witness to help out and give his best recollection. If you want to limit the record for impeachment purposes, you want to ask such questions as "Is that your entire recollection?"

MR. TIGUE: I want the witness' recollection.

MR. MAC DONALD: Give him your best recollection about the subject of documentation for the Union Carbide relationship.

A Yes, I recall the special agent asking for -- I recall him asking for substantiation and background information.

Q Tell me what the conversation was the best you recollect.

A I believe we were supplied copies of Treadwell bills.

Q No, no. The question was what do you recollect about the conversation? Somebody asked -- you asked Leonard for records, right? Tell me what the conversation was about.

A That's what I was trying to do.

Q I'm sorry.

A We received documentation on Treadwell. We received copies of Treadwell invoices that Mr. Leonard had obtained from Treadwell and at this point we were still sort of up in the air because we didn't know what Treadwell specifically performed under any contract they may have had because we did not have any contracts between Treadwell and Mr. Leonard. And we asked for documentation and substantiation on this point.

Q What did Mr. Leonard say?

A At that time he said that -- can I look at the --

Q Sure. I just wanted to know if you remember without looking at it. I see you

need to look at it, which is fine.

A At that time he said all these records will be supplied to Mr. Laski. And he saw no need to submit them again.

MR. MAC DONALD: Is that reference limited to a Treadwell-Leonard contract or does it include the Leonard-Carbide contract as well? Refresh your recollection if you need to.

Q It included both contracts.

And in addition we wanted further documentation on the accommodation sales with Davidson Company. These were all questions that were -- had to be explained.

Q What did you say when he said, "We have already given these to Laski"?

A We said that we do not have any contracts in our files on those matters.

Q Then what did Mr. Leonard say after that?

MR. MAC DONALD: By the way, the memo recites that Leskowicz is the speaker.

MR. TIGUE: I said what did Mr. Leonard say, and he answered the question. You really are interfering with my interview of this agent

because what you do is you lead him into answering the question. I asked him what did Mr. Leonard say. He told me.

MR. MAC DONALD: Let Mr. Tragna correct the record if it is appropriate.

MR. TIGUE: So then you come along and you say: Now, wait a minute, the memorandum says Mr. Leskowicz said that.

MR. MAC DONALD: Where you refrain from being fair with this witness, I will intervene and in fairness call facts to his attention where I think a distortion is occurring.

MR. TIGUE: You were not present at the meeting. I asked him what Mr. Leonard said and he told me. You now want him to conform his testimony to what someone else wrote and he signed it.

MR. MAC DONALD: It is unfair not to call to Mr. Tragna's attention --

MR. TIGUE: Why don't you want until I finish my questions.

MR. MAC DONALD: If you continue to mislead the witness I will intervene at the point of misleading.

MR. TIGUE: Did I mislead him when I said what did Mr. Leonard say?

MR. MAC DONALD: The memo says Mr. Leskowicz was speaking.

Q Did Mr. Leonard say anything?

A You mean about supplying documentation?

Q Right.

A At that point I don't think he said anything. I think it was his accountant that objected to it.

Q Do you think that now, because of what Mr. MacDonald said --

MR. MAC DONALD: Mr. Tagna, don't bother answering that. That's an argumentative question.

MR. TIGUE: It seems to me if you tell him how to answer the question it is wrong. He said it was Mr. Leonard who said it. Now you want him to say Mr. Leskowicz said it to be consistent with the memorandum.

MR. MAC DONALD: When he focused your attention on the documents requested, not on the speaker, that was unfair, I thought.

Q Let me be unfair again. What did Mr.

Leonard say on the subject?

A I don't think Mr. Leonard said very much on that subject. I think it was primarily his accountant that objected to --

Q Did you think I was unfair when I said what did Mr. Leonard say?

MR. MAC DONALD: Don't bother answering the question. It is argumentative.

Q So you said that Leskowicz said, "I already gave you copies of these contracts."

You then said, "But we don't have copies in the file?"

What did he say, "he" being Mr. Leskowicz or Mr. Leonard, whoever answered back.

A He must have said that -- really, I don't recall the -- specifically what he said except that he gave the impression that everything had been provided and that he is not going to do it again.

Q He said that after you said, "But I have looked in the file and it is not there"?

A Right. Yes.

Q Did you make a note of the records you had asked for at that meeting?

A I made a note --

Q Of some?

A Of some records.

Q Did you make a note about the UCC request?

MR. MAC DONALD: Why don't you look at the notes themselves. Just identify the page of the notes.

MR. TIGUE: I would like the witness to speak for himself.

MR. MAC DONALD: I will instruct the witness not to answer and not characterize his writing.

MR. TIGUE: Maybe he can read the writing.

Q Page 1 of your notes on that date. It says: "Treadwell Re: Union Carbide. TP." What does that mean?

A Taxpayer.

Q Can you read the rest? I can't read it very well.

A "Taxpayer has list and will give copy."

Q Did Mr. Leonard say he would not give you a copy of that?

A Of the list?

Q Yes.

A No. I have a note here. It says he will give a copy.

Q With respect to Grace, what did Mr. Leonard say or Mr. Leskowicz? And please tell me who is doing the talking?

A What person?

MR. MAC DONALD: He is asking you to read the note first of all and then he will go back and ask you what you recall in addition to the notes, I suppose.

THE WITNESS: Should I wait until he finishes?

Q I don't even want him here. You do what you think is right.

MR. MAC DONALD: He asked you two questions in one. I have to be careful to separate your answers if he is going to continue that kind of questioning. Read No. 2 for him.

A 2 says, "Grace. TP," which is the abbreviation for taxpayer, "has copy shipments."

Q What did Mr. Leskowicz or Mr. Leonard say about the Grace shipment?

MR. MAC DONALD: I don't understand

MR. MAC DONALD: I don't understand that. Do you mean two questions, what's your best recollection --

Q Mr. Tragna, you wrote something down, right?

A Right.

Q Do you remember the conversation relating to Grace?

A I believe he came up --

Q Who is he?

A Who is he?

Q Yes.

A Leskowicz.

Q Leskowicz said what?

A Leskowicz said he had copies of the purchase invoices, I believe, from Grace, Davison Division.

MR. TIGUE: It's impossible to conduct an interview of this witness where every two minutes your phone rings and the witness has to refresh his recollection and you have to have the question back. It's not fair.

(At this point Mr. MacDonald took the phone off the hook.)

MR. TIGUE: Thank you.

Q You were telling us, I believe, what Mr. Leskowicz said about Grade and the shipments.

A I believe at this point he submitted copies of the purchase invoice from Grace, Davison Division.

Q Next line down says, "TP no books," is that right?

A Right.

Q What conversation did you have on the subject of TP's books?

A Taxpayer did not maintain formal books.

Q Who said that? Only if you remember. If you don't remember, you should not be saying you remember if you don't.

Do you remember?

A No, I can't say that I do remember.

Q The next line down there is some information about Union Carbide. Where did you get the information to make those entries, Mr. Tragna, please?

A Where did I get the information to make these entries?

Q Yes, sir.

A This was part of the amounts that we were searching for. It was not shown as deposits.

MR. MAC DONALD: Let me interject that you take the time to examine those items. The question is, Mr. Tragna, not to characterize them as to whether they were included in income or excluded, as $291,000, but whether you remember where you got the information, for example, the checks themselves, bank statements, letters from Union Carbide or elsewhere.

THE WITNESS: This information, to my best recollection, was obtained from the Union Carbide's correspondence with us. You know, they included lists of cancelled checks.

Q Are you sure about that?

A Well, to the best of my recollection.

Q On page 2 --

A May I take a look at this a second?

Q Sure, please do.

MR. MAC DONALD: Before we leave this subject I would like to ask if it refreshes your recollection with respect to the $291,000 figure in that column was the gross amount of the Union Carbide gees reported in '67. If I put that in

the form of a question that I did, do you remember the gross fees Carbide reported in '67? Do you remember the figure?

THE WITNESS: No, I don't.

MR. MAC DONALD: Are there work papers that would refresh your recollection as to that figure?

THE WITNESS: Certainly.

Q Would you take a look at those, Mr. Tragna, please.

MR. TIGUE: It is your question. I want to find out where this information came from.

MR. MAC DONALD: You know perfectly well that's the gross figure that's included. If we want to take the time to identify an entry, we will.

I direct your attention to a single line on page 603 and I ask you to examine --

THE WITNESS: I have to look at the headings.

MR. MAC DONALD: Top four lines.

MR. TIGUE: Let him look at the whole thing. You are not going to let me see it anyhow.

MR. MAC DONALD: On examination of the top four lines of page 603, does it refresh your recollection as to the gross amount of the Carbide fees per the books?

THE WITNESS: What's 603?

MR. MAC DONALD: The number on the bottom of the page.

THE WITNESS: Yes. The information that Union Carbide sent us showed that they had paid $704,848.

MR. MAC DONALD: And 84 cents?

THE WITNESS: Yes.

Q What's the date of that work paper?

MR. MAC DONALD: He didn't finish the answer.

A The books only reflected $291,000 of that amount.

Q What's the date of the work paper, please?

A This is December 31, '67.

MR. MAC DONALD: Let me ask you if that date which you just read, 13/31/67, appears in the upper right-hand corner of every page throughout this packet of work papers. And does it

thus reflect the tax year involved and not the date that the writing was put on the piece of paper?

THE WITNESS: That's right. I don't think this is my work paper.

MR. MAC DONALD: No one asked you to say it was. This is a work paper in the '67 report.

Now, does the $291,000 figure on this work paper correspond to the $291,000 figure on your notes?

THE WITNESS: Right. That was the amount that was reported as income by the taxpayer.

Q Let me see if I have the answer to my question.

Where did the information come from to write the notes which total $291,000 and the dates? That's the question. Not all the stuff that Mr. MacDonald wants to show. The question is, where did the information come from? Did it come from the work paper he just showed you?

A Well, there are numerous work papers that I could have gotten this information from or this could have been even the taxpayer's response to showing us what the amount of Union Carbide

checks had been included in income.

MR. MAC DONALD: I want to direct your attention to page 3 of your memo of that conference and ask you to read the sentence which begins in the middle of the page, and I will quote it for the record:

"Mr. Leonard let us look at his 1966 and 1967 bank statements. . .showing income that was reported marked in red on the bank statements in the credit column."

Does that suggest that a source of information concerning such deposits might have been Mr. Leonard's bank statement itself?

A I did check them through J. D. Leonard & Associate bank statements at First National City Bank. I have the bank account number.

MR. MAC DONALD: Did you put an auditor's check mark next to each figure indicating that that was the source of information?

THE WITNESS: Yes.

Q He is not an accountant, you know, you are. What he just said was wrong.

Did you mean yes, when you said "Yes"?

A Yes, I meant yes when I said "Yes."

Q That's what you did. You wrote them down and you put the check mark down afterward?

MR. MAC DONALD: Or did you put the check mark down before you put the figure down.

MR. TIGUE: What you said, he took them from the bank statement and put -- let me withdraw it.

Q Show me, please, Mr. Tragna, from whence came these numbers, do you remember?

A MR. MAC DONALD: What's your best recollection? Help Mr. Tigue out.

A I got them from the work papers on the case. Which specific work paper -- there were numerous work papers that reflect what the deposits were.

Q And all the suggested answers about you took them from the bank statement that Mr. MacDonald just made don't refresh your recollection?

MR. MAC DONALD: Don't bother arguing with Mr. Tigue.

A No.

Q What Mr. MacDonald just said doesn't refresh your recollection?

MR. MAC DONALD: Really, when I suggest you don't answer, don't answer, okay.

Q Tell us, please, as best you can recollect how the meeting ended and was there any further discussions that you still wanted the UCC contract, if any discussion?

A The meeting ended, you know, we were still on a friendly professional basis and I had requested additional information on other items that I thought would be necessary and --

Q I notice you are reading from the statement. Do you recall,without looking at the statement, what was said?

MR. MAC DONALD: I don't think he was.

MR. TIGUE: You put it in front of him and his eyes were in that direction.

Q Do you remember, without looking at the statement, what was said at the end of the meeting?

A Well, I don't know if it was made clear. You say did I request stuff. The special agent requested a lot of this stuff. At the end of the meeting the special agent turned it over to me and said, "What else would you like to request?"

Q At that point did you say, "I would like

the UCC aonctract," in words or substance?

A No, I don't recall saying that. I requested additional substantiation: divorce agreements and foreign tax credits, et cetera.

Q I notice on the second page of your work papers, in the upper right-hand corner, there is a date and a number beneath it. What does the number mean, would you tell me, please?

MR. MAC DONALD: "97?

MR. TIGUE: Yes.

A That's my work paper number.

Q And I noticed on the date it looks to me on my paper the original has been erased. Do you remember if you erased it or changed it or when that was written?

A I must have changed it around the same time that I wrote it down.

Q Are you sure you did not make that some time in May and then later on change the date in July after the meeting?

A Oh, you know what I believe happened, I made the determination as to what information I would need.

Q In May?

A In May. And I made a list and then I asked for this information at the meeting so I changed the date to the date of the meeting and I put the note received certain things and he would mail certain things in the left-hand corner.

Q Do you recall whether or not you asked for that information in the June meeting?

A No. It would have been the July 28th meeting.

Q You made the notes originally in May and then you had the meeting in June, right?

A That's right. That's what it looks like. I didn't ask for the information in June.

Q Can you tell me whose handwriting this is, please?

A I don't know whose handwriting it is. I know who I think it is.

MR. MAC DONALD: Help him out. Who do you think it is?

A I believe that's Mort Laski's handwriting.

Q Did you testify in the grand jury, Mr. Tragna?

A No, I did not.

Q Do you know if Mr. Laski did?

A No, I don't.

Q Do you know if Mr. Reiner did?

MR. MAC DONALD: You are really talking about today's motion, I take it.

A No.

MR. MAC DONALD: Sometimes you can help him out; sometimes you can't.

MR. TIGUE: When it suits his purpose, you can help me out.

Q I asked you if you know whether Mr. Reiner did.

MR. MAC DONALD: Don't bother answering his question.

Q Could I move to the May 4th meeting, 1972, please.

Were you present at the meeting, the preliminary meeting which was held with Mr. Leskowicz?

A Yes, I was there.

Q Were you present at the meeting later on with Mr. Leonard?

A Yes, I was.

Q And you took no notes at that meeting, is that right?

A That's right.

Q Were you told not to?

MR. MAC DONALD: Don't bother answering that question.

MR. TIGUE: Why do you tell him not to answer such questions.

MR. MAC DONALD: Because you are prying into internal agency procedures and practices.

MR. TIGUE: Sure I am. I would like to prepare my defense here. It seems to me a perfectly proper question.

MR. MAC DONALD: You can ask it at the trial. If the judge rules it is permissible you will get an answer.

BY MR. TIGUE:

Q On the subject which starts on page 3, it is called "Unreported Income from Union Carbide," you can refresh your recollection in a minute, Mr. Tragna, but do you remember what the conversation was on that subject? If you don't, of course, you can read that memo. I just wanted to see what your memory is.

A There are two different types. There

are two different types of transactions. One included $12,000 and the other included $12,000 about which we asked --

Q That's not the one I would like to ask you a question about; it's the other, the other Union Carbide income, which is alleged to be unreported.

A Right. The same thing had occurred in that meeting as in the --

Q Tell me what the conversation was as best you recollect it.

A We were trying to track down $111,000, I believe it was, of income we did not see reported by the taxpayer, namely, checks by Union Carbide made out to Leonard Process. And we were shown bank statements where the checks were deposited and there was also the checks were made out in '67 and they were not deposited until '68. We asked the reason for this and he reiterated that there was litigation going on with Union Carbide and that they had held up the checks and that was the reason why they were not deposited until '68.

Q Is that the total of your recollection as to what was said on that subject?

A I can't recall anything else. Besides the $12,000?

Q Yes. I am not talking about the $12,000. I am talking about any other conversation about UCC.

A That's right.

Q Would you like to take a look at page 3 or 4 or anything else that would refresh your recollection as to what was said?

A That's right, there was the additional thing that was brought up about the checks being endorsed over to Treadwell.

Q What was said, do you recall, now that you read the memo?

A He said that --

Q Who is "he"?

A I believe it was Mr. Leonard.

Q It was not --

A I believe it was Mr. Leonard.

Q What did Mr. Leonard say, please?

A He explained these accommodation sales saying that the amount he received from Union Carbide was the same amount that he owed to Treadwell and that he merely endorsed the checks over to

Treadwell and did nt report the income and did not report the expense. He claimed the amounts to be equal and therefore had no income consequent to them.

Q Is that all he said that you can remember?

A Essentially, yes.

MR. MAC DONALD: That really is a leading question that tends to cut off the answer, naturally. In fairness you might direct the witness' attention to page 4 of his notes and let him turn the page --

MR. TIGUE: I said he can look at page 3 and 4 or anything else.

MR. MAC DONALD: Look at page 4. See if it refreshes your recollection as to further conversation.

A Yes, the special noted discrepancies in the amount that the Union Carbide checks had and that they -- Treadwell's bills were.

Q Just tell me what was said, if you recall.

A There were discrepancies between the amounts that the special saw as, the dollar amounts

of the Union Carbide checks and the dollar amounts of the Treadwell bills, and the taxpayer was asked to explain this.

Q. What did he say?

A He said that he would have to look into his records and come up with the documentation.

Q Did he say anything else?

A That's all I recall.

Q Do you have an independent recollection of what was said at that poing or is it simply you see it in the memorandum of Mr. Schulman and you assume that's what was said?

MR. MAC DONALD: Don't bother answering that question.

Q I would like to know what your recollection is today, what do you remember?

MR. MAC DONALD: You received it and that's that.

MR. TIGUE: I don't think that is that.

MR. MAC DONALD: You are suggesting he did not remember what he just told you under oath that he did.

MR. TIGUE: You showed him a piece of paper,what someone else wrote, and he reads

it in essence or the substance of it.

MR. MAC DONALD: He closed the paper, turned it face down, and paused and reflected, and then told you, I remember, and gave further conversation.

Q Is that right?

A That I turned the paper over?

Q That you turned it over, you reflected, and then you remembered what was said.

A Well, I was -- I read what was said and I was trying to recall myself being in that situation at that meeting.

Q And did you recall?

A Yes, I did. This was the flavor of the conversation. I can't give you a verbatim transcript but this is what the whole discussion was about.

Q Even after having refreshed your recollection and what not, do you recall Mr. Leonard or Mr. Leskowicz saying anything else on the subject of UCC? In addition to what you have already told us.

A That's all I recall.

Q And it is your recollection that Mr.

Leonard was the one who said that he would have to check his records, is that correct?

A Yes, because Mr. Leskowicz didn't appear to be too familiar with these accommodation situations. I guess Mr. Leskowicz was only familiar with the books and records and these did not show up in the books and records.

Q Please tell me what happened at the end of the meeting. Mr. Schulman left and you and Mr. Reiner stayed?

A That's right. We continued looking at the information.

Q How long did you stay there?

A I believe it was that afternoon and the next day.

Q And that was when you began the audit for 1968?

A That's right. That's when we started looking into the corporation return. I believe it was fiscal '69.

Q Did you look at any UCC records that afternoon?

MR. MAC DONALD: At Leonard's?

MR. TIGUE: Anywhere.

A I don't recall seeing additional UCC information.

Q When you performed the audit that afternoon and the next day, did you look at any UCC records or invoices or anything of the sort?

A No.

Q You left the case when, on --

A June 2nd the decision was made to transfer the case. The actual transfer may have taken place a few days after that.

Q Incidentally, what does Mr. Leonard look like, anyhow?

A What does he look like?

Q Yes.

A Slight man, fair complexion. By "slight" I mean he isn't too tall and he is on the slim side.

Q What color hairdoes he have?

A I think it was light brown.

Q What else did you do on the Leonard case in addition to what you have already told us about these interviews?

MR. MAC DONALD: I don't understand that. Do you mean other persons he may have spoken to, prospective government witnesses or

otherwise?

MR. TIGUE: Whatever he did, I want to know what he did.

MR. MAC DONALD: Don't bother answering about internal procedures or other witnesses.

Q I would like to know what you did on the Leonard case.

MR. MAC DONALD: For the record's sake, don't bother answering unless the question is narrowed to a permissible area. I will instruct you not to answer.

MR. TIGUE: What do you regard as permissible.

MR. MAC DONALD: Internal agency work procedures are not permissible. The identification by direct or indirect means of government witnesses is something you are not entitled to. If you would like a generalization about general audit procedures, incouding third-party checks and work with respect to such information, he can generalize without identifying specifics.

MR. TIGUE: I have no such interest in what his general procedures are. I want to know what he did in the Leonard case.

MR. MAC DONALD: If you want generalizations about the Leonard case, that's fine. If you want specifics --

Q Give me the generalizations about the Leonard case, if you would, Mr. Tragna, please.

A Well, I continued trying to make summaries as to what's been reported in income. As to what expenses might require further looking into. Just general audit procedures. You know, relooking at some of this stuff and seeing if I got some new ideas as to where the income could be or what the income is and et cetera, et cetera.

Q What does "et cetera, et cetera" mean? That's what I want to know.

A A regular audit. There are certain internal reports that have to be made up.

Q What were they?

A They were internal reports to --

MR. MAC DONALD: Don't bother answering about what the internal reports were. Mr. Tigue full knows what the ordinary reports were.

Q What reports did you prepare in this case?

MR. MAC DONALD: Don't answer that.

Q Did you prepare a fraud referral report?

A No, I did not.

Q Do you know who did?

MR. MAC DONALD: Mr. Singer.

A I believe it was Mr. Singer.

MR. TIGUE: I am running out of questions since you won't let him answer the ones that are really important. I will conclude the interview for now but I certainly intend to bring this to the judge's attention this afternoon.

MR. MAC DONALD: Shall we do Schulman?

MR. TIGUE: Thank you very much, Mr. Tragna. I appreciate it.

Subscribed and sworn to before me

this day of , 1975.

ROBERT SCHULMAN resumed.

EXAMINATION CONTINUED

BY MR. TIGUE:

Q Mr. Schulman, you are the same Mr. Schulman who testified here under oath yesterday, right?

A Yes, I am.

Before we go further, if I may, I would like to correct one or two of the answers I gave you yesterday relative to at least two of the questions that I could recall.

I had answered that I had received the case in April. In trying to recall, it may have been March. It was either March or April that I received the case.

MR. MAC DONALD: Hold it. Let's refresh your recollection from the appropriate line of your chronological work sheet.

A If I can look at my work sheet I would be able to definitely tell because the initial entry would be "Case assigned," and the date.

MR. MAC DONALD: Would you look at teh entry which is three lines -- four lines wide, for 3/15/72 on page 2491, and don't read other entries, please.

Does that refresh your recollection that the precise date was March 15, '72?

THE WITNESS: Yes.

Q March 15th?

A That's correct. So that in recalling, it wasn't April, as I had stated yesterday, but March.

Q Okay.

A One other clarification.

Q Please.

A You had asked me about contacts with Mr. Leonard. There may have been a phone conversation with Mr. Leonard, a short phone conversation on the item of the Chinook stock prior to my first face-to-face contact with Mr. Leonard in May.

Q Could you just summarize that conversation?

A I am not sure the conversation was with Mr. Leonard. I do know I received information that Mr. Leonard had been advised by an attorney as to how to handle that stock in his return. Mr. Leonard -- the information I received, and I don't know whether I received it from Mr. Leonard, Mr. Leskowicz or possibly the revenue agent.

MR. MAC DONALD: Let me tell you that you are instructed not to speculate about that

in the future, and you are to read your testimony and make whatever corrections are appropriate after you have a chance to read it. And if you had a phone call -- this answer began you had a phone call maybe with Leonard, and Mr. Tigue's question was, "What's your best recollection of such phone call?" and I take it you have no such recollection of a phone call.

THE WITNESS: Not any -- I can't recall any specific phone conversation with Mr. Leonard prior to my first meeting with him in May.

MR. MAC DONALD: As far as whatever advice Leonard received from his lawyer on Chinook, you weren't there, you haven't the foggiest idea what he received and did not receive. You can only report what he told you after the fact.

A I'm not sure who reported it to me.

MR. MAC DONALD: Or what it was that was reported to me?

THE WITNESS: I know what it was that was reported to me.

Q You are on Mr. MacDonald's side, right?

A I am. But I am also here to tell the truth as best I can recall.

Q In that spirit --

MR. MAC DONALD: You have a right to and you should read everything you said yesterday and make whatever corrections are required by your oath.

Q Do you know any information which tends to show that Jackson Leonard is not guilty of the charges in the indictment?

A No.

Q Now, I really have forgotten how far we got on Mr. Schulman yesterday.

It appears we were on the May, '72 meeting because my last question is, I noticed the last line of the statement says the revenue agents stayed behind to begin the '68 audit, and that's what the last line of the May '68 memorandum says.

With respect to the topic of the UCC unreported income of your report, do you remember what Mr. Leskowicz said, if anything, about this whole matter?

A I don't recall him saying anything specifically about the whole matter. As I said yesterday, it was left with the fact that they don't seem to recall or would have to look into what I

was speaking about relative to the 10 per cent unreported income that I had confronted or asked them about and that they would have to check their records.

Q Did you ask for a copy of the UCC report during that May meeting, or did anyone else there ask for that contract?

A I can't recall.

Q Did Mr. Reiner have anything to say during the course of the interview? He was the new man on the case, was he not?

A I can't recall, but I conducted the interview.

Q They were assigned to help you in the investigation, is that right?

A Well, their position is cooperating revenue agent. They are restricted to conducting an audit into the returns that I am investigating.

Q What were you investigating in May of '72? Were you investigating the '68 return?

A To the best of my recollection I was not investigating the '68 return.

MR. MAC DONALD: What were you investigating?

THE WITNESS: The '66 and '67 returns.

MR. MAC DONALD: When you left that meeting, you left two agents behind to work on what return?

THE WITNESS: The '68 audit.

Q Did you tell Mr. Leonard at the beginning of the interview that you were looking into '67 and '66?

A I can't recall which years or if I told him which years. I covered it more by item rather than period of time since it was these four items that I had previously mentioned that were the key or the prime questions or prime items that I was looking into at that time.

Q Did you give Mr. Leonard any additional warnings towards the end of the interview relating to 1968?

A No.

MR. MAC DONALD: To the extent that the earlier warnings didn't relate to '68. You haven't asked him whether they were limited, have you?

MR. TIGUE: I did and he said he didn't remember.

You are not as interested in his answers as I am. I very carefully listen to them.

Q The next meeting you had with Mr. Leonard was in July of 1972, is that right?

I am just reading from your memo. That's

why I said that. You can refresh your recollection.

A Correct.

Q In the two-month period that intervened, did you talk to Mr. Leonard?

A I can't recall.

Q Did you talk to Mr. Leskowicz?

MR. MAC DONALD: Don't bother answering the question about who else you contacted.

MR. TIGUE: Leskowicz is the taxpayer's representative.

MR. MAC DONALD: What's the relevance of whether he talked to Leskowicz or not?

MR. TIGUE: Because if Mr. Leskowicz said -- makes an admission on behalf of Mr. Leonard, I can't imagine anything more relevant.

MR. MAC DONALD: Did Mr. Leskowicz make an admission on the behalf of --

MR. TIGUE: Let's see if they had a conversation, first.

Q Did you have a conversation?

A I can't recall.

Q What was Mr. Lefkowitz, an attorney? Did you have any conversation with him prior to July 5, 1972?

A I believe so.

MR. TIGUE: Oh, yes, this is the one I formerly asked you for, Mr. MacDonald, May 23, 1972, conference with Mr. Lefkowitz. I thought that was within our agreement. We don't have minutes of that agreement, but --

MR. MAC DONALD: 5/23? Let me take that under advisement and I will see what I can do.

MR. TIGUE: Shall I proceed or wait for you?

MR. MAC DONALD: I'm looking for it.

I have no objection to your looking at this. I think it is without the scope of our agreement, but I will make a gift of it to you.

Q Other than this meeting you had with Mr. Lefkowitz on May 23, 1972, did you have any other conversations before July 5, 1972 with Mr. Lefkowitz?

A I don't remember the date, but I had called him and written him relative to the affidavit that I had requested from him.

Q Did he ever give it to you?

A Never.

Q Was that the only subject of the conversation?

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A There were some side issues involved that Lefkowitz had explained to me that he had handled legal matters in the past for the taxpayer, and Mr. Lefkowitz also mentioned to me some criminal cases that he had tried during the course of his career. Superfluous information, I take it to be.

Q You were not sufficiently impressed.

Did you have any conversation with him with respect to Union Carbide and any income therefrom?

A Not that I can recall.

MR. MAC DONALD: You are referring to the same time period?

MR. TIGUE: I am trying to get the context so I have it in mind.

Q I gather you did not speak to Mr. Leonard between May 4th and July 5th; is that right?

A To the best of my recollection.

Q Let's go to July 5th, if we can.

Could you, just for a minute, without looking at your memo -- and you can certainly look at it if you want to, but I would like if you can tell me generally what happened at the meeting, how long it took, who was present

and what was said?

A The July meeting was the one with Mr. Jacob Lefkowitz as the representative of the taxpyaer.

Mr. Lefkowitz --

Q Mr. Reiner was present, right?

A I know someone else was present from the Internal Revenue Service, but without looking at the memo I don't know who it was, but if my memo states it was Mr. Reiner, it was Mr. Reiner.

Mr. Lefkowitz attempted an oral explanation as to what had to be done with the subject alleged unreported income received from Union Carbide in general terms; that some, or approximately $85,000, had been given to a gentleman now deceased, to be passed on to some union officials at the construction site.

Q Do you remember the name of the man, Frank Zelman?

A Z-e-m-l-a-n.

Q This is Mr. Lefkowitz speaking, is that right, the attorney?

A Yes.

At first Mr. Lefkowitz explained it in a

little more detail, and just exactly which of the detail was added by Mr. Leonard, I can't recall.

MR. MAC DONALD: Without consulting your memo; and maybe that will help and maybe it won't, right?

THE WITNESS: Probably.

Q Do you recall what else happened at the meeting?

A I can't recall. I know it was cut short before I was able to question Mr. Leonard as to more details on the story or the explanation given to me at that time. This was because he said he just couldn't give me any more time. He had a court case. He had to be in court.

Q Mr. Lefkowitz said that; is that right?

A Yes.

Q Do you want to take a look at your two-page memo? Maybe that will help you a little bit.

A Oh. This is sundry detail.

Mr. Lefkowitz had originally given a power -- power of attorney to represent the taxpayer which didn't cover the correct years. I can't recall which years it did cover, but it

wasn't inclusive as to the years we were looking into. At that time he submitted this corrected or second power.

I again reminded him and asked him about the affidavit that had been requested of him when I saw him when he did not represent the taxpayer.

Q He said, "Don't worry about it. You will get it"?

A Words to that effect.

Q Then Mr. Lefkowitz said that Mr. Leonard was going to cooperate fully in the investigation; right?

A Yes.

Q And that any records that you wanted would be made available to you?

A Yes.

MR. MAC DONALD: Did he make any such records available to you? For example, the contract?

THE WITNESS: I can't recall having asked him for a copy of the contract. I may have, but I don't recall.

Q If you had asked him, would you have

written it in your memorandum?

A I think I would have.

Q You did ask him for the Union Carbide billings for '67-'68?

A As I had requested at my earlier meeting with him in May.

Q You asked him for the catalyst sales? You asked for those, also?

A Right.

Q You asked for a copy of the '69 and '70 tax returns?

A As I read it and now recall, these were earlier requests and I just reminded him that these requests hadn't been filled.

Q So, in answer to that, Mr. Leonard said, Number One, he doesn't have his billings for Union Carbide; is that correct?

A Correct.

Q And -- he does not have any invoices -- what did he say with respect to invoices, copies of invoices that he submitted to Union Carbide?

A Which is what I asked him for originally and at that time. They are called billings or invoices; it's a matter of terminology.

Q To Union Carbide from whom, his company?

A Yes.

MR. MAC DONALD: What response did he make?

THE WITNESS: He said he doesn't have them. I don't think I pursued it, but it inferred that he either lost or mislaid them and they just weren't available.

Q Did he tell you that he received invoices from Treadwell and that those invoices were simply transmitted to Union Carbide?

A I don't recall him telling me that. It was my understanding that he billed Union Carbide separately and that a copy of Treadwell's invoices or Treadwell's invoices to him were not passed on to Union Carbide.

Q Maybe I ought to be more precise.

Was there a distinction made between the amounts called for in the contract and the amounts -- when I say "called for in the contract," the flat amounts like the $37,000, as opposed to the various engineering charges incurred by Treadwell?

A This wasn't discussed in the detail that you just mentioned during this conference.

Q You did not make a distinction in your discussions with Mr. Leonard regarding the engineering bills which were rather odd amounts, as opposed to the fixed amounts set forth in the contract?

A I can't recall discussing the contract per se or any of the terms of the contract per se at that time.

Q Did Mr. Leonard say he had no billings of any kind to Union Carbide, or copies?

A That's right.

Q Did he tell you he could get them from Union Carbide if he needed to?

A I can't recall.

Q He also told you he had no billings or invoices on the catalyst sales?

A That's right.

Q And he said he would give you copies of the '69 and '70 tax returns?

A Well, he said he would see to it that his preparer supplied it.

Q That's Mr. Leskowicz; right?

A Correct.

Q And some other information relating to

income-producing properties; right?

A Correct.

MR. MAC DONALD: What does "preparer" mean in the terminology --

THE WITNESS: The preparer of the tax return.

MR. MAC DONALD: Does that indicate the person who signs beneath the taxpayer's name on the face of the 1040?

THE WITNESS: It's called for, but it's not strictly adhered to, and there is a technicality therein that oftentimes the preparer is an employee of an accounting firm and the firm's name just appears as preparer.

Q In any case, you are referring to Leskowitz here?

A Yes.

Q Mr. Leonard does nto refer to Mr. Leskowicz as his preparer; he said Ed or Mr. Leskowicz, right?

A That's IRS jargon.

Q So then Mr. Lefkowitz goes into an explanation of in essence saying that the 10-percent override, as I'd call it sometimes, was received by

Mr. Leonard and paid to Mr. Zemlan who, in turn, gave it to union officials?

MR. MAC DONALD: Is there any reason to have him summarize the two paragraphs? If you are directing his attention to another subject, great.

I hate to have half an hour's conference compressed into two sentences unless there is a need for it. It sounds too quotable, your synthesis.

Q What I just summarized, I summarized a conversation which took a little while; right?

A Yes.

Q In essence, Lefkowitz said he got the money and he used it to pay off union officials through Mr. Zemlan on the UCC contract; right?

A Correct.

Q Can you tell me what you mean when you say Mr. Leonard then submitted etails? What did he say?

That's important, as to what he said, if you can recall that. Take a minute to read that, if you like.

A I have some of the details below.

Q You might want to read to yourself and then tell me --

MR. MAC DONALD: You are entitled to incorporate by reference your memoranda, if you want to, in an answer. You don't have to play memory games.

A In connection with the payments made to Union Carbide, he gave as a reason that Union Carbide had complained in general to people. I don't know whether they specifically complained to him, but that they complained that other plants put in -- put up by them at prior times were not completed timely. That was one of their complaints.

And he wanted this to go smoothly,so having met Mr. Zemlan, who was a representative of the construction people on the plant, he spoke to Mr. Zemlan about it, and what Mr. Zemlan might know or do or help in insuring that there is timely completion of the plant, of construction of the plant.

Q What steps, if any, did you take to determine whether or not that in fact did happen?

MR. MAC DONALD: Don't answer the

question.

You are asking for the investigative information which the IRS has in its files just like all the other times you have asked that same question.

MR. TIGUE: I am amazed you won't let him answer that question.

Q He told you in essence he gave some money to Mr. Zemlan?

A Right.

Q The question is, what did you do to verify that or not verify that?

MR. MAC DONALD: Same instruction.

MR. TIGUE: It seems to me it goes to the very heart of the case. I think the Judge will make him answer that.

You are directing him not to answer?

MR. MAC DONALD: Until Judge Owen tells us so.

Q During the course of your investigation did you talk to anybody at Peter Kiewit?

MR. MAC DONALD: Don't answer.

Q Did you talk to any union officials?

MR. MAC DONALD: Same instruction.

Q Did you make any determination as to whether or not the payments in fact were made?

MR. MAC DONALD: Same instruction.

Q Did you recommend to your supervisors that Mr. Leonard be prosecuted?

MR. MAC DONALD: Same instruction.

That's a little different.

Did you make a written special agent's report in this case as is ordinary in cases that are referred to Regional Counsel and Justice?

THE WITNESS: Yes.

MR. MAC DONALD: Is that some twenty pages long and contain a lot of information?

THE WITNESS: I don't know how many pages it is but, other than that, yes.

MR. MAC DONALD: With respect to its contents, I instruct the witness not to answer, either directly or indirectly.

MR. TIGUE: You won't let him answer the question whether he recommended prosecution?

MR. MAC DONALD: That document will have to speak for itself, and any oral discussions in addition to it are improper areas for discovery at this point.

MR. TIGUE: I don't agree with that.

Q Mr. Schulman, do you have any objection to my looking at your special agent's report?

MR. MAC DONALD: Don't bother answering that question.

Q Is there anything there you would not like me to see?

MR. MAC DONALD: Don't bother answering that question.

Q You made notes during the course of that meeting, did you not?

A Yes.

Q Do you have those notes?

A No.

Q Where are they?

MR. MAC DONALD: I think yesterday I indicated -- I haven't had a chance to. I will undertake to inform myself and I will inform you concerning those notes and their status as 3500 material, per your letter request.

MR. TIGUE: They are clearly 3500 material if they exist.

MR. MAC DONALD: I appreciate your helping in pointing me in that direction. Thank you.

MR. TIGUE: You are most welcome.

Q What else was said by Mr. Leonard with respect to the payments to union officials or to Mr. Zemlan other than what is in your memo? Anything other than what's in the memo that you remember was said?

A It's hard, if not impossible, for me to recall anything that isn't in my memo, because what I do is put down everything that I think is or might be pertinent in the memo.

Q And you leave out the things you regard as not being pertinent?

MR. MAC DONALD: Don't bother arguing with Mr. Tigue.

You try to fairly summarize the substance of a person's statement; true?

THE WITNESS: True.

Q And you leave things out when you write your note?

MR. MAC DONALD: Which are things which are irrelevant to the investigation, like social pleasantries.

Q Do you leave things out?

A Yes.

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Q You are the one who makes the decision whether they are relevant or important?

MR. MAC DONALD: Sure. He is the author.

A Yes.

Q Mr. Lefkowitz is the one who brcke the meeting up with some important case he had to work on?

A Yes.

Q How long did the meeting last -- the memo says it lasted about an hour; is that right?

A Approximately.

Q Did you leave, or did Mr. Lefkowitz leave, or both?

A They both left together. This meeting was at the offices of Internal Revenue Service.

Q Did you ask for any further documentation on thismatter, the very specific area of the payoffs to Zemlan?

A I asked for a complete detailed story -- explanation, supplying dates and amounts and places of the alleged payments to Mr. Zemlan.

Q Between July of 1972 and December of '72 did you have any conversation with Mr. Leonard?

A Not that I recall.

Q When I say "conversation," did you communicate with him in writing or by telephone or in person?

A Not that I can recall.

I have to qualify that. What we call a final conference letter was sent to Mr. Leonard.

Q Right.

Other than that?

A No.

Q What about Mr. Leskowicz, did you have any conversation with him during that period?

A I can't recall.

Q What about Mr. Lefkowitz, other than setting up the appointment and adjourning it for December 12, 1972?

A I seem to recall calling his office in an attempt to have him comply with his promise -- for want of a better word -- to return as soon as possible to continue the conference which had been cut off because he had to leave.

Q But no conversations of substance except to arrange the meeting which ultimately took place on December 12th; right?

MR. MAC DONALD: Let me refresh the

witness' recollection.

I think you told me once or twice you made telephone efforts to get that missing affidavit from Lefkowitz?

THE WITNESS: Yes.

As a matter of fact, I wrote to Mr. Lefkowitz, reminding him that he still owes me an affidavit.

Q He never complied?

A Correct.

Q Other than that communication with him?

A No.

Q So the next meeting we have is December 12th. Mr. Leonard is not there; is that right?

A Correct.

Q And at that meeting, an eight-page statement was delivered by Mr. Lefkowitz; is that right?

You don't have to count the pages. It says on the front page. Lefkowitz submitted a copy of an eight-page statement.

A Yes.

Q Is this the statement?

MR. TIGUE: I will put my initials on the

back, today's date.

MR. MAC DONALD: If you think that's an admissible document --

MR. TIGUE: I don't. I do at the trial.

A I can't tell if this is a statement of a copy of the statement.

Q I don't mean to say it's an original. The statement is attached to your report there that you have in front of you, right?

A Yes.

Q This was given to me by Mr. MacDonald.

MR. MAC DONALD: Did you have a chance to cross-examine the author of that document? Indeed, is it signed and is the authorship clear on its face?

THE WITNESS: No.

MR. MAC DONALD: Thus, that takes care of the admissibility.

Q You got the statement, did you not?

A I think Mr. Lefkowitz stated this was Mr. Leonard's statement. And, of course, I told him that in its present form it wasn't acceptable, since --

Q I understand.

He gave this to you, right?

A Correct.

Q It was unacceptable because it's not admissible in court; right?

A Well, it doesn't state who is making the statement.

Q So then you got an affidavit, or you requested an affidavit, did you not?

A Correct.

Q Did you get the affidavit which was essentially the same but signed and notarized?

A Correct.

Q When did you get that?

MR. MAC DONALD: We will supply you with the date. I have a cover letter.

I spoke too soon. Sometime later.

A I am pretty sure it would be stamped in. But I can narrow it down to being sometime after December 12th and before December 30th.

Q Within two weeks, roughly?

A It probably was less.

Q After you got the affidavit, did you ask to talk to Mr. Leonard again?

MR.MAC DONALD: Don't --

A No.

Q So you didn't avail yourself of an opportunity to cross-examine him as Mr. MacDonald just asked?

MR. MAC DONALD: Was Mr. Leonard tendered by his counsel or did he prefer to deal with the writing that he tendered to you? Or do you have any recollection one way or another on that score?

THE WITNESS: Well, I have the recollection that I did not ask to speak to Mr. Leonard again relative to the affidavit submitted by him.

Q Did you attempt to verify or disprove the affidavit --

MR. MAC DONALD: That's not responsive, Mr. Schulman.

Did Mr. Lefkowitz ever say to you, "You have a perfect right to have Leonard come in here and get sworn and do a Q & A with him? Did he ever say that to you, Lefkowitz?

THE WITNESS: Not those words.

Q Did he say that in substance?

A He said he would have the taxpayer cooperate.

That was at the earlier conference in

July.

Q And in fact if you wanted to put him under Q & A, you could have issued a summons; is that right?

MR. MAC DONALD: Do not argue with Mr. Tigue with respect to such a matter.

Q Do you have summons power?

MR. MAC DONALD: Don't bother answering the question.

MR. TIGUE: It's not argumentative.

MR. MAC DONALD: Your client has taken the Fifth effectively since June of '72 and has dealt only through counsel of his choice. If you intend to let the jury think otherwise, then it's relevant whether he took the Fifth or not.

MR. TIGUE: Taking the Fifth does not constitute giving a detailed eight-page affidavit as to precisely what happened.

Q Did you ever ask to interview Mr. Leonard and it was refused?

MR. MAC DONALD: The subject is closed.

MR. TIGUE: It's not closed at all. You just made a statement on the record he took the

Fifth and that is not true.

As late as 1974 he gave you a further statement.

MR. MAC DONALD: Is he willing today to come in and give a statement?

MR. TIGUE: That's not the point. The point is what happened when the investigation went on.

MR. MAC DONALD: The subject is closed.

Q Did you ever ask to have Mr. Leonard under Q & A --

MR. MAC DONALD: It's also irrelevant.

Q Answer the question or don't answer it.

MR. TIGUE: You can tell him what you want to.

Q Did you ever issue Mr. Leonard a summons?

MR. MAC DONALD: Don't answer that question.

Q Did you ever talk to Mr. Leonard directly and ask him to come in for an interview?

MR. MAC DONALD: Don't answer that question.

Q I am talking about at any time, other than the ones we have already spoken about.

MR. MAC DONALD: You can answer that.

Did you have any contact with the taxpayer

directly, other than the ones we have already spoken about?

THE WITNESS: The final conference letter is in effect giving the taxpayer an opportunity to come in and further explain anything he wishes to explain.

Q He gave you a statement under oath as to what he wanted to explain; right?

MR. MAC DONALD: Same instruction.

Let's put the letter in evidence and let the jury read the letter and decide whether the statement is responsive, in stead of characterizing written communications.

Q After you received the affidavit, did you make any further request to speak with Mr. Leonard?

MR. MAC DONALD: Did you have any contacts with him at all, or were you dealing through his counsel?

A I didn't speak to Mr. Leonard.

Q Did you ask Mr. Lefkowitz to bring in Mr. Leonard because you wanted to talk to him some more?

A No.

Q Did you ask for any further documentation or papers in connection with the affidavit?

MR. MAC DONALD: Until I am advised as to some reason for the admissibility of this whole line, I will stop the whole line.

It seems inconceivable that statement comes in without your client getting on the witness stand and what the agents did to verify or what they negatively did not do is irrelevant until such time as a cross-examinable witness is on the witness stand.

MR. TIGUE: The trial hasn't begun yet and I am conducting my pretrial investigation.

MR. MAC DONALD: Educate me.

MR. TIGUE: You are worried about your strategy, whether you should put the statement in in your direct case or rebuttal.

I think this is all improper.

MR. MAC DONALD: I solicit some education as to why it is that statement is admissible --

MR. TIGUE: It doesn't have to be admissible when you are interviewing a witness before trial. You know that. We are not in a courtroom.

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(Discussion off the record)

MR. TIGUE: Basically, if I can summarize what we said off the record, it is that I regard the interference by you in the questioning of these various witness as to be a denial of a fair trial to Mr. Leonard, that is, you are preventing his counsel from determining what the facts are which I regard, even though you don't, as important to prepare an adequate defense for him.

I think without that information I may very well be in a position of not being able to defend him, and he may not be in a position to get a fair trial.

That's my basic position.

MR. MAC DONALD: Great. If and when you want to tender him and tender his box and stop claiming the Fifth on all of the evidence he possesses, then I will change the rules. We are operating under rules --

MR. TIGUE: One of the rules we operate under is the Fifth Amendment to the Constitution. He has a right not to talk to you. Prosecutors don't like it. I didn't like it when I was a

prosecutor but I lived with it.

Your job is to do justice. My job is to protect my client. I don't have to tell you that. And I don't think it's doing justice when you interpose yourself in an interview which I would like to have privately with this witness and other witnesses because you are applying the Federal Rules of Criminal Procedure or the rules of evidence in a trial, especially in view of the fact that anyone I have ever brought down here, you were permitted to ask any questions you wanted to.

MR. MAC DONALD:You haven't brought anybody yet.

MR. TIGUE: I brought Mrs. Leonard down here.

MR. MAC DONALD: I had direct communications with Mineko Leonard and the next thing I knew you showed up with her.

MR. TIGUE: Did I tell her she couldn't answer your questions? Did I direct her not to answer any questions?

MR. MAC DONALD: We will go into that some other time.

Refresh our recollections concerning the scope of that interview. Aside from that interview, I haven't seen a soul.

The only other witness you promised to produce has since been shut up by her counsel, Mr. Naftalis.

MR. TIGUE: That was based on the implied feeling before I even talked to her. After she spoke to me she wanted her own lawyer and she got one.

MR. MAC DONALD: I didn't have any idea what she would do.

MR. TIGUE: Nor did I. I said if she was willing to talk to you, I would bring her down.

MR. MAC DONALD: I think the Court of Appeals ought to know that the First National City Bank through Shearman & Sterling has refused to tender any of its bank officers without Mr. Tigue's presence, and thus he has sat in on the Government's interviews of three of those officers, just as though we were in Zurich.

MR. TIGUE: That advice to have me present was based on Shearman & Sterling's legal

advice to them to have me present at those interviews. I never once directed or suggested that a witness not answer any questions. Quite the contrary has been the case here yesterday and today.

Let me make one further statement for the record that that decision was arrived at without any influence on my part as to whether or not I should be present; indeed, the first time I heard of it was when Mr. MacDonald called me and asked me if I was available to attend the interview and I came down.

MR. MAC DONALD: You did have several phone calls with Matthew Gruskin of Shearman & Sterling before that advice.

MR. TIGUE: I had one conversation with him and it did not relate as to that conversation as to whether I should be present.

MR. MAC DONALD: It did relate to my wanting to interview City Bank officials.

MR. TIGUE: It did not. He called me and -- Mr. Gruskin called me and said that you had subpoenaed some records, and I said, "You should do whatever is required of you under the

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law. That was the substance of the conversation. I did not --

MR. MAC DONALD: Did he ask for your client's permission to disclose his affairs or waiver of any claim --

MR. TIGUE: There was a rather detailed convereation and my response was, "You do whatever is required by the law." There was no --

MR. MAC DONALD: Did he solicit permission?

MR. TIGUE: There was no discussion about any interviews and who would be present. I have no recollection of any such conversation and I would have remembered them, had they taken place, so don't blame that on me.

MR. MAC DONALD: I wasn't there, but you haven't yet described for the Court of Appeals what the, quote, detailed, end quote, conversation was.

MR. TIGUE: I don'tthink I have any obligation to. You have implied that I told Mr. Gruskin to tell you that the witnesses would not be interviewed without my being present and I represent to you that I never said any such thing,

and I am prepared to say that under oath.

The rest of our conversation is not a matter of your concern.

MR. MAC DONALD: Nor the Court of Appeals'.

Q Basically, you would just as soon answer the questions, wouldn't you?

MR. MAC DONALD: Don't bother chatting with Mr. Tigue on the record or off the record.

Q I am asking on the record.

MR. MAC DONALD: Don't bother commenting. You are instructed not to answer.

Mr. Tigue has got more discovery than any counsel in the history of the Southern District in the last ten years with a written record, and he wants more.

Q Basically, Mr. Schulman, you really would like to answer my questions, wouldn't you?

MR. MAC DONALD: Don't answer.

Q What did you do in the investigation from the time you began in March or April of '72 up until June of '72?

I'm sorry, up until -- yes -- July of '72.

MR. MAC DONALD: Same instruction.

Q After July of '72, what further steps did you take in connection with the investigation?

MR. MAC DONALD: Same instruction.

MR. TIGUE: I don't have any further questions in view of your position here, Mr. MacDonald, but I certainly intend to bring it to the Court's attention to get whatever relief I can, either this Court or the Court of Appeals.

MR. MAC DONALD: Would you care to call to my attention the court decision which you contend makes this procedure improper and constitutes reversible error for any subsequent conviction of your client?

MR. TIGUE: Funny you should ask. I have it with me this morning. Yes, I have the case. It's Gregory v. United States, 369 Fed.2nd 185, 188, District of Columbia (1966).

Subscribed and sworn to)
before me this)
day of 1975.)

C E R T I F I C A T E

STATE OF NEW YORK)
)ss
COUNTY OF NEW YORK)

I, LEON ZUCK, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JOSEPH J. TRAGNA and ROBERT SCHULMAN, the witnesses whose depositions are hereinbefore set forth, were duly sworn by me, and that this transcript of such depositions is a true record of the testimony given by said witnesses.

I further certify that I am not related to any of the parties to this action, by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day January, 1975.

Leon Zuck

TESTIMONY.

LZd

U.S. DISTRICT COURT
FILED
MAR 11 1975
S. D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-versus-

74 Crim. 599

JACKSON D. LEONARD,

Defendant.

----------X

New York, New York
January 3, 1975
2:30 p.m.

Before:

Hon. RICHARD OWEN,

District Judge.

Appearances:

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York

By: W. CULLEN MacDONALD, Esq.
Assistant United States Attorney

JOHN J. TIGUE, JR., Esq.
Attorney for Defendant

(Case called.)

THE COURT: I don't have moving papers. I just have letters, is that right? I have oral applications and letters.

MR. MAC DONALD: There was another order to show cause which your Honor signed which -- I can provide a copy to the Court.

THE COURT: Let me borrow it for present purposes. I see some shoulder-shrugging going on here.

Do you need this file for purposes of your argument?

MR. MAC DONALD: I don't believe so. I think we mainly have a factual question, at least on the government's motion. Mr. Tigue has filed some papers and that's not quite the same.

THE COURT: Go ahead.

MR. MAC DONALD: This is an application by the government for an order of production for a contract which Mr. Tigue represented to the Court that he has had, that he had in his possession when we were last before your Honor, and as I understand it from the exchange of correspondence, the central issue is a factual one concerning whether or not that document is the property of the corporation for which assertion of privilege is inappropriate, or whether it is

the property of Mr. Leonard personally and we have three witnesses this afternoon who may be able to resolve that factual question.

THE COURT: You feel a hearing is necessary and you are ready to go forward?

MR. MAC DONALD: Yes, sir.

MR. TIGUE: May I be heard?

THE COURT: Yes.

MR. TIGUE: Your Honor, I have offered to stipulate the basic facts of any hearing that will take place this afternoon and I attempted to encourage Mr. MacDonald that it would not be necessary to have present three of Mr. Leonard's present or former attorneys on other matters. I think there is really no factual dispute as to any of the underlying facts. I think the legal consequences of what took place is clearly a matter for the Court and I frankly don't believe that there will be any need for any witnesses.

In addition to that, your Honor, since these men are attorneys for Mr. Leonard and whatever communications they had, I would think would certainly be privileged, whether they are offered to Mr. Leonard in person in his personal capacity or even as the president of the corporation, which is the Leonard Process Company, Inc., so I intend to --

THE COURT: Except I don't know what --

LZd

Mr. Mac Donald, I am sure, is aware of that problem.

MR. TIGUE: I am prepared to go ahead with the hearing, your Honor, except I don't know what facts will be established at the hearing that I am not prepared to stipulate to.

MR. MAC DONALD: I am not sure I know -- why don't we start with Mr. Parker of the Shea Gould firm, who has with him two files, the contents of which I have not been allowed to inspect, and I believe your Honor will hold that no proper attorney-client privilege can shield them and I think we can send Mr. Parker on his way.

After those two files are produced, and we can get Mr. Schurtman, the second attorney.

THE COURT: Let's take this one bite at a time.

Mr. Parker.

A L L A N J. P A R K E R, called as a witness by the government, having first been duly sworn, was examined and testified as follows:

THE COURT: Mr. Parker, I want to be as cautious as I can be here with regard to attorney-client privilege, so at any time you feel that there is a question about that, you are at liberty to discuss with your client or anyone else that you may feel appropriate to question this assertion. So do not have any concern about saying, "Judge, this area

troubles me," and we will give it a little thought.

THE WITNESS:: Thank you, sir.

DIRECT EXAMINATION

BY MR. MAC DONALD:

Q Mr. Parker, have you brought with you today copies of the bills rendered by the Shea, Gould firm to the Leonard Process Company, Inc. -- and to Mr. Jackson D. Leonard?

A They didn't have those. I asked for them. You know, you called me about them this morning. The bills I don't have. I am sorry. That's in some kind of dead storage and on that kind of notice I couldn't get it, but I will get them to you if they are important, but I don't have the bills.

Q Do you have any personal knowledge of whether or not the Leonard Process Company, Inc. received bills for legal services during 1968 and 1969 from Shea, Gould?

A Well, personal knowledge, no. The Leonard Process Company was not my client and I wasn't the billing partner on it. Bruce Hecker was. So I don't know personally as to whether there is -- I couldn't -- however, I do have here -- well, no, that's something else.

Q Have you brought with you a second file which may bear the caption, Union Carbide Corporation?

A Yes.

Q A claim matter in December '69?

A I brought the whole Union Carbide file, whatever we had. Let's see. Union Carbide. Correspondence, yes. Here is the Union Carbide file. Right. Yes.

THE COURT: The answer to your question is he has.

THE WITNESS: I do have that.

Q Can you examine that file and tell us if a bill was submitted to the Leonard Process Company, Incorporated or if your time was charged to that plant?

A Okay, I will look through the file for that purpose.

Union Carbide, is that it? That's the file you wanted, right?

Q Yes, sir.

A No bill in correspondence.

Court papers, Union Carbide, that's an empty file.

Client's papers is an empty file.

Extra copy, originals.

This is everything on Union Carbide. Memoranda.

MR. MAC DONALD: Your Honor, may we, for the sake of expedition --

THE WITNESS: There is a memoranda here, but it's not in my handwriting.

MR. MAC DONALD: May we just deem marked as

Hearing Exhibit 11 the files the witness has just referred to and I will, rather than take the time to mark them with separate exhibit numerals at this point -- I would like --

THE COURT: Mr. Tigue, do you have any objection?

MR. TIGUE: No objection.

I might also add, your Honor, with respect to the bills, Mr. Mac Donald asked me for the corporation's copy and I think he probably has a right to those, but the request came very recently and I haven't had a minute's time.

MR. MAC DONALD: I hadn't meant to dispute Mr. Parker. I thought I made clear to him my request for the bills when we last had this matter scheduled.

THE COURT: Without trying to anticipate your position, are you trying to elicit that there was in fact a corporation in existence that was billed for legal services in those years?

MR. MAC DONALD: Yes, sir.

THE COURT: Is Mr. Tigue going to dispute that?

MR. TIGUE: No. There was a corporation in existence. Shea, Gould does not work for nothing and they did submit and were submitted.

THE COURT: They submitted bills to that corporation?

MR. TIGUE: And I am prepared to produce those

bills. I will be in an hour.

MR. MAC DONALD: Does the stipulation cover Hearing Exhibit 11, the U.C.C. matter which, files of which are produced here for your Honor?

MR. TIGUE: Absolutely not, your Honor. I have no objection to the Court looking at them. If these are letters between Mr. Leonard and his lawyers saying, "Here is what you should do, here is what you shouldn't do."

MR. MAC DONALD: The stipulation is that Leonard Process Company, Incorporated, the corporate client, was the client in that matter. That's the only reason I wanted the billing.

MR. TIGUE: I would like to take a look at them.

THE WITNESS: Here is the whole file.

THE COURT: Do you have any objection to Mr. Tigue having a look, although at that point you can not?

MR. MAC DONALD: No. Except that from that I have no further questions of Mr. Parker. Mr. Schurtman was the lawyer who handled that firm when he was with the Shea, Gould firm.

THE WITNESS: I will leave everything I brought.

THE COURT: Very good.

MR. TIGUE: Your Honor, I think I would have to take a look through all these.

Number one, I do consent to their being marked as one exhibit. For instance, if there are letters to Mr. Leonard in 1967 when there was no corporation in existence, I would object to the production of those. I have no objection to producing them to the Court, but when he leaves them here I would like the record to be clear they are not in the custody of Mr. Mac Donald.

THE COURT: They will be in the Court's custody.

Mr. Parker, will you go into the firm's storage and pull the bills, for what date?

MR. MAC DONALD: I thought I understood Mr. Tigue to stipulate that Leonard Process Co., Inc., a corporation, was the client for the Union Carbide matters and that was all I intended to prove.

THE COURT: He then went on to a U.C.C. matter about which you are familiar and I really am not at this point and I wondered whether that was covered by what you were talking about.

MR. TIGUE: The problem, your Honor, is that there was a contract with Union Carbide which covered at least two years, 1967 and 1968. In 1967 Mr. Leonard operated as a proprietorship. In 1968 he operated as a corporation. The corporate records, I think that the government has a right to look at those insofar as they are

not privileged communications between Mr. Leonard and his counsel. That's the position I've taken all along.

THE COURT: Mr. Mac Donald, I understand, is endeavoring to demonstrate that as of the date of the incorporation, there was an assignment to the corporation of this contract which includes the piece of paper and he says takes it out of the rubric of a personal privileged view.

MR. TIGUE: I guess there was an assignment of the assets of the Leonard Process Company, a proprietorship. What I contest is that, number one, we do not have the original contract.

Number two, if there were other papers and other copies of those contracts, I believe they remain the property of Mr. Leonard and they are still protected by the privilege, even though there was an assignment of the typewriters, the desks, the very valuable processes which are worth millions of dollars, all that was transferred, but every piece of paper which Mr. Leonard generated during the course of his professional life covers decades and I don't believe it was intended, nor do I think the record will indicate that there was an assignment of all those prior papers.

THE COURT: Was there some unexecuted portion of this contract that brought income to Leonard, Incorporated?

MR. TIGUE: Yes, there was.

THE COURT: Wouldn't the instrument itself be an asset of the corporation as evidence of their right?

MR. TIGUE: Your Honor, my position is that the rights and obligations under that contract were assets to the corporation and that was what was assigned. The pieces of paper, indeed, the original we don't have. The extra copies were not. That these are business records of Mr. Leonard which he has a right to keep --

THE COURT: Let's assume, Mr. Tigue, that during the corporate performance of this contract there was a breach of it. Wouldn't the corporation have the right to come forward with that piece of paper and say, "This is the document upon which my rights depend"?

MR. TIGUE: Yes, I would think they would, your Honor, but the --

THE COURT: So obviously then the corporation has some right to that piece of paper.

MR. TIGUE: But that piece of paper as far as I know does not exist or wherever it exists, no one has it. The original -- the contract was executed in an original for Union Carbide and I'm given to believe that there was an original for Mr. Leonard. And I think that either party would have a right to sue under that contract, including the Leonard Process Company, Inc., and they would have a right to

produce evidence and so forth, but if for some reason or other Mr. Leonard wanted to refrain from producing his personal copies of it, I would think he would have a right to assert his Fifth Amendment privilege if he so sought.

THE COURT: I understand your point.

MR. MAC DONALD: There was a contract dispute later between Carbide and Leonard and that dispute resulted in a claim letter being sent by the Shea, Gould firm to Carbide for a settlement and there was a settlement promptly thereafter. Thus, there was a corporate request for legal services. And certain documents were given to the firm to obtain that claim and that's the file which Mr. Parker has in his hand and I think Mr. Schurtman can throw some light on precisely whether the pieces of paper were considered corporate property at the time. I think Mr. Parker found a bill.

MR. TIGUE: He found two bills.

THE WITNESS: I found two bills.

MR. TIGUE: I don't believe there is any privilege with respect to those. I have agreed to it. But even if it's corporate property, it is nonetheless protected by the attorney-client privilege, your Honor. The corporation has such a privilege and if the president of the company asserts that privilege, the government has no right to get the records.

THE COURT: The corporation is under --

MR. TIGUE: At the moment he is attempting to get production of the entire file.

That is different from the contract.

MR. MAC DONALD: I really am not.

THE COURT: I understand that.

MR. TIGUE: You don't want that file?

MR. MAC DONALD: I want it to sit right there.

THE COURT: Why don't you cross-examine Mr. Parker to the extent you are inclined and then we will go on?

MR. TIGUE: I am not inclined to.

THE COURT: Mr. Parker, you may step down.

(Witness excused.)

MR. MAC DONALD: Your Honor, I have ten pre-marked exhibits, copies of which have been given to Mr. Tigue and copies of which I have to show the witness.

THE COURT: You had better keep these because these are marked for your purposes.

MR. MAC DONALD: They all bear the same markings. That's your Honor's copy.

(Continued on page 14.)

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WILLIAM SCHURTMAN, called as a witness by the government, having first been duly sworn, was examined and testified as follows:

THE COURT: How are you, Mr. Schurtman?

THE WITNESS: Fine, Judge.

THE COURT: I give you the same injunction I gave Mr. Parker, and that is at any time you feel there is a matter within the attorney-client privilege, you are to be as cautious as you deem appropriate under the circumstances.

THE WITNESS: I understand that.

DIRECT EXAMINATION

BY MR. MAC DONALD:

Q Have you been cautious to date in your conversations with me and deferred any substantive conversations until this hearing?

A Yes, I have.

Q I would like to ask if you were, during 1968 and 1969, associated with the Shea -- a partner in the Shea, Gould firm?

A Yes, I was.

Q Did you do some work personally with the man seated here, Jackson Leonard?

A Yes.

Q Did that work include in 1969 authoring a letter

that was sent to the Union Carbide Corporation, copy of which I'll provide you with at this time?

THE WITNESS: Your Honor, I believe any work I did for Mr. Leonard at the time would be covered by attorney-client privilege unless Mr. Leonard is willing to waive the privilege. I don't believe I should have to answer such questions.

THE COURT: Let's see what the exhibit is.

Q I show you Government's Exhibit 9, or Hearing Exhibit 9 for identification and ask you if you authored that document on or about November 17, 1969?

A The document indicates that it was signed by Bruce Hecker. It does not have my signature on it.

Q By examining the document or the authorship initials or the files before you, which have been deemed marked 11, can you tell us if you had any hand in its authorship, nevertheless?

MR. TIGUE: Your Honor, I object to that question. I think that whether he had a hand in authoring it or he provided the services --

THE COURT: The form of the question is bad. Sustained in that form.

Q Please describe what connection you had with the matter which resulted in the letter, Government's Exhibit 9?

THE WITNESS: Your Honor, to answer that question I would have to explain legal services that I rendered for a client. Which I believe are covered by attorney-client privilege.

THE COURT: Well, I don't know. Let me ask you: Did you dictate any of this letter to a girl?

THE WITNESS: I don't believe I did.

Q Mr. Schurtman, have you consulted the files before you recently to refresh your recollection concerning this matter?

A I consulted several documents in the files. This letter is not one of them.

THE COURT: Let me ask you another question. Did you and Mr. Hecker -- just yes or not at this point -- have a discussion about writing a letter to Union Carbide containing substantially this content?

THE WITNESS: I believe we did.

THE COURT: And as part of that discussion did you and Mr. Hecker talk about conveying this content to Union Carbide Corporation?

THE WITNESS: I believe we did, your Honor.

THE COURT: Were you aware he was going to send the letter, that is, Exhibit 9?

THE WITNESS: I can't answer that definitely

because I have no specific recollection.

THE COURT: Do you have any recollection of this letter going out, Exhibit 9?

THE WITNESS: No specific recollection without checking the files.

THE COURT: Mr. MacDonald?

MR. MAC DONALD: Yes, sir.

Q Isn't it a fact that the matter that you were employed for was to make such a claim in November of 1969 of Union Carbide?

MR. TIGUE: I object to that, your Honor, because the matter I would presume is the basis of conversation between Mr. Leonard and Mr. Hecker and/or Mr. Schurtman, and whatever the conversations were, I believe were privileged. The government has no right to look into these matters between an attorney and his client.

There is a letter which was sent to a third party.

THE COURT: It seems to me the law permits them to ask whether they were retained on a specific mattter.

MR. TIGUE: Yes, your Honor.

THE COURT: That's what the nature of the question was, so I will overrule the objection.

MR. TIGUE: It went to the substance of their conversation. If not, I withdraw it.

THE COURT: Let me hear that question back so I am sure about it.

(Question read.)

THE COURT: I will overrule the objection.

Q A claim of Union Carbide.

THE WITNESS: Am I directed to answer that question?

THE COURT: You are.

A The answer is yes.

Q Is Government's Exhibit 1, a copy of which I am now providing you with, a writing which you received in respect of that retention?

MR. TIGUE: I object to that, your Honor. This purports to be a handwritten note initialed by Mr. Leonard, addressed to "Dear Bill," which is either Bill Schurtman or Bruce Hecker. I guess it's Mr. Schurtman. If that isn't a privileged communication, I don't know what it is.

MR. MAC DONALD: I don't think the identification of the document which I provided the witness is subject to a proper objection. If the witness is unable to identify that document, then the matter is closed. If he can identify it, we can go further in deciding in what capacity the document was authored.

THE COURT: Well, let's cross that first bridge.

Do you recognize this piece of paper at all, Exhibit 1?

THE WITNESS: Frankly, I don't.

Q Is the original of it in the file? Have you seen it on prior examination?

A I haven't seen it. If you want me to look at the file, I will.

Q Please.

A It's not in the Union Carbide file.

Q The other two files are bonuses that Mr. Parker left behind and are not apt to contain such a writing.

A He left some general files behind. I'd have to look through them.

Q I would like to direct your attention to on or about November the 24th of '69. Do you see such a memo that appears at that location?

A I don't see that memo.

Q Independent of your ability to identify that memorandum, do you remember that you were provided with the contract referred to in the November letter, the previously identified letter, for your use in preparing such a claim letter?

THE WITNESS: Your Honor, I believe I'm still in

the area of attorney-client privilege.

THE COURT: No, I will overrule the objection and direct you to answer.

Mr. Tigue, let me say this before Mr. Schurtman answers here. Exhibit 1 appears to be a memorandum. I am not told whose it is, but in any event, it appears to be a memorandum directing that the letter, Exhibit 9, be sent and in effect spelling out what its contents are to be.

Correct me if I'm wrong, but the attorney-client privilege does not extend to a situation where the client tells the attorney to make something known to a third party. It seems to me that Exhibit 1 is a direction to one "Bill" to make something known to Union Carbide Corporation, specifically what's enclosed in Exhibit 1, and is apparently reduced to a legal letter, Exhibit 9, am I right about that?

MR. TIGUE: I agree with your Honor's principle of law, but it seems to me that if the person has a communication with his lawyer and thereafter the lawyer issues what is Exhibit 9 here, that is, the letter, I think what's in the letter is clearly waived, but if a person like Mr. Leonard goes to a lawyer and he tells him a lot of information and the lawyer makes a judgment as to what ought to be in the letter and what ought not to be in the letter, I think the letter, which is sent at his direction, is

probably not privileged. But the underlying discussions and communications that are had which lead up to that, I believe, are privileged matters.

THE COURT: Is it privileged -- this gets me down to the last question that was asked. Is it privileged -- the letter, Exhibit 9, says, "We have reviewed a contract between Leonard and your company." Obviously the contract isn't privileged because it's in possession of both sides of this agreement and therefore, does it become privileged for Mr. Schurtman to decline to answer whether he looked at a contract which is described in Exhibit 9, before Exhibit 9 was prepared?

MR. TIGUE: Well, your Honor, I have no objection to Exhibit 9, number one, provided I know where it came from. It seems to me it says, "b.c.," which means blind carbon or blank carbon, to Mr. Leonard.

THE COURT: It has a stamp on it, "Leonard Process Co., Inc., received."

MR. TIGUE: Maybe Mr. Mac Donald can enlighten us where he got it.

THE COURT: Let's not get into that. What I want is whether there should be an answer or no answer from Mr. Schurtman. I am inclined to permit him to answer whether or not he looked at a copy of this contract prior to

sending out Exhibit 9, unless you can give me some really good reason why he shouldn't.

MR. TIGUE: Your Honor, I think what a lawyer does is part of his work product and communications he has with his client are privileged. I think what is intended to be disclosed was disclosed in 9 and I don't object to 9, your Honor. But the underlying notes that his client made to him and the judgments that he entered into in disclosing some of that to Union Carbide, I think that's privileged, your Honor, and it's also his work product.

THE COURT: I don't see in looking at a contract which is not privileged as an attorney-client communication, and therefore, I will overrule the objection and direct him to answer.

THE WITNESS: Will you repeat the question?

BY MR. MAC DONALD:

Q Were you provided with he contract referred to in your November letter at some point prior to that task being completed?

A Yes, sir.

Q Will you describe to his Honor what it was that you recall looking at in that regard?

A Well, I do recall looking at a contract with Union Carbide. I recall looking at some other papers and I

recall having a meeting with Mr. Leonard at which he explained the problem to me and told me in essence what --

THE COURT: You are going beyond the question.

THE WITNESS: I am not going into the details, but he simply told me the nature of the claims.

Q Have you given us your best recollection of the physical document that you examined in this regard?

A At this point, yes.

Q Would it refresh your recollection to suggest that you received that physical document from Mr. Leonard and later, upon completion of the project, returned it to Mr. Leonard?

MR. TIGUE: I object to that, your Honor. Whatever Mr. Leonard gave him or discussed with him.

MR. MAC DONALD: Would it refresh the witness' recollection if he pictured receiving the document or giving it back to Mr. --

THE COURT: Overruled.

You may answer.

A I can't picture it physically, your Honor.

Q I would like to hand you Exhibits 3 and 10 for identification -- 3 to start with, and ask you if you are able to identify that document?

MR. MAC DONALD: I think in fairness, your Honor,

I provided -- I am going to provide another copy, which I'll ask the reporter to mark 3, to the witness, in the truncated version which has been premarked.

(Document marked Government's Exhibit 3 for identification.)

Q Mr. Schurtman, would you substitute the new 3 and examine it, please, and tell his Honor if you are able to identify that document.

MR. TIGUE: While he is looking at it, your Honor, I would like to put my objection on the record. I would object to the form of the question in that I would ask that it be worded other than being exhibited or discussed with Mr. Leonard. It seems to me it's all part of the same --

THE COURT: For present purposes, that isn't necessary and I will sustain your objection.

MR. MAC DONALD: I thought it was, can you identify the exhibit. Don't tell us anything more than yes or no.

MR. TIGUE: Part of that answer is yes, I can tell you about this exhibit, because I got it from Mr. Leonard.

THE COURT: Let's see what his answer is and then we will strike out anything that is inappropriate.

MR. TIGUE: I would like your Honor to note for

the record I object to your Honor's direction to the witness to answer the question. I just want the record to be clear that I am not --

THE COURT: I appreciate that. Your record is protected.

THE WITNESS: This document states on its face that it is an agreement made in February 1967 between Union Carbide and Leonard. I have no independent recollection that this was, in fact, the document that I reviewed.

MR. MAC DONALD: I skipped a question which I should have covered before showing you that one.

Q Is there any contract in the file today? Any such contract; in the event that the witness is looking for other unrelated contracts, he need not.

A The file does not contain a complete copy of Government's Exhibit 3. It contains certain pages.

THE COURT: Let's mark them for identification.

THE WITNESS: What, the specific pages?

THE COURT: Yes.

MR. MAC DONALD: For purposes of this hearing, it is stipulated the premarked Exhibits 2, 5, 6, 7, and 8 are admissible without further testimony.

MR. TIGUE: Yes, I agree to that, your Honor.

THE COURT: At the appropriate time they will

be marked in evidence.

MR. MAC DONALD: I wrote in pencil and I forgot that my copies were the Court copies. I am providing the clerk with the proper copies.

MR. TIGUE: Are these the two pages?

THE COURT: 2, 5, 6, 7, and 8.

(Exhibits 2, 5, 6, 7, and 8 were received in evidence.)

Q Mr. Schurtman, I finally handed you Government's Exhibit 10 for identification and my question is, first of all, can you identify that exhibit?

A Again, on its face, it says it is an agreement dated February 1967 between Union Carbide and Leonard. It seems to consist of only a few pages. I don't identify it as such.

Q Can you recall having seen it on a prior occasion?

A You mean having seen these particular pages stapled together?

Q Not that xerox, since I prepared it myself. A copy that begins "Conformed copy," and contains the matter depicted on those pages?

A I have no independent recollection.

MR. MAC DONALD: I think the one thing I would ask the Court to do -- well, I could ask the witness, I

suppose.

Q Would you please examine the selected pages which have now been marked -- 12 is the next exhibit number.

(Government's Exhibit 12 was marked for identification.)

Q Would you for the record read the page numbers that appear on Exhibit 12?

THE WITNESS: Your Honor, again I am being asked to disclose the contents of the Shea, Gould files.

THE COURT: He asked you to read the page numbers.

MR. MAC DONALD: Actually, I would offer 12 as being apparently portions of an agreement that were provided the firm in respect of the claim that was to be asserted.

THE COURT: Let me look at Exhibit 12.

MR. TIGUE: Your Honor, I would object to it on the grounds there are markings on those pages which my guess is were put on there by the attorneys. That's not part of the work product. I believe nothing really is. If the lawyer gets a contract, and he puts markings down there as to what ought to be pressed and what ought not to be, that's part of his work product and his representation for Mr. Leonard and the corporation.

MR. MAC DONALD: Page 6 does not appear in Exhibit 12. I'm not sure the government presses its offer.

THE COURT: It does not.

Mr. Schurtman, you have drawn our attention to four pages, 21 through 24, is that right?

THE WITNESS: Yes, sir.

MR. MAC DONALD: I don't press the offer because I don't think those pages are material to either the letter that was sent or to the government's application on this occasion.

Q Is it your testimony, then, that you are unable to identify Government's Exhibit 3 before you or Government's Exhibit 10 before you, as being other copies of what was supplied you in the course of preparing that letter or not?

A All I can tell you is I did see a contract between Leonard and Union Carbide, dated February 1969. If I looked at the documents you have given me, they appear to be similar to the contract that I have seen, but I can not tell you of my own independent recollection that the two exhibits you furnished me are copies of what I saw.

Q Certainly. Can you tell us -- you haven't thus far -- do you have a recollection of yours being a ribbon original with an ink signature or do you have no recollection inthat respect?

A I have no recollection.

Q Is it your recollection that at the conclusion of

services you returned the contract to Mr. Leonard?

THE WITNESS: Your Honor, this gets into the question of attorney-client privilege again.

THE COURT: No, I will overrule that. That's not a communication. Did you return it to them?

THE WITNESS: I have no independent recollection of returning anything, but the file copy contains a memorandum indicating that the client's file was returned to him.

MR. TIGUE: I object to that, your Honor, and move it be stricken from the record, because if a lawyer in the course of his representation makes --

THE COURT: Strike it from the record. He has no recollection.

Q Would you mark for his Honor, please, that memorandum which you just referred to and tell us who its author is?

THE WITNESS: Am I directed to do that?

THE COURT: Yes, do that.

MR. MAC DONALD: I believe 13 is next.

(Government's Exhibit 13 was marked for identification.)

MR. MAC DONALD: I would ask the Court to inspect 13. We would offer it and to the extent that any matter thereon appears to record a communication given by

Mr. Leonard to Mr. Schurtman to seek legal advice, we would ask it be redacted from the brief identifying description that the witness gave a moment ago. It would appear only to record a fact of a communication flowing from lawyer to client and not otherwise.

MR. TIGUE: I persist in my objection, your Honor.

THE COURT: Mr. Tigue, look at Exhibit 13 for identification. You may not object to it when you look at it.

MR. TIGUE: I do object to it, your Honor. I have seen it.

THE COURT: On what ground?

MR. TIGUE: On the ground it's part of the attorney's work product and it's part of his overall representation of Mr. Leonard. If he makes notes in the record, I don't believe they are producable. They are protected by the privilege.

THE COURT: Mr. Schurtman, do you know whose initials these are?

THE WITNESS: Mine, your Honor.

THE COURT: We are talking about 13 for identification.

MR. MAC DONALD: Maybe I could ask the witness if it's his testimony that such matters as recorded on that

memo are properly -- withdrawn.

THE COURT: Do you remember making this memorandum?

THE WITNESS: Yes, I do.

THE COURT: At the time you made the memorandum, did it represent the facts as you understood them to be?

THE WITNESS: Yes, your Honor.

THE COURT: I assume you made this memorandum at or about the time of the events that you have recorded?

THE WITNESS: Yes.

THE COURT: I will overrule the objection.

(Exhibit 13 received in evidence.)

MR. MAC DONALD: We have nothing further of Mr. Schurtman.

CROSS-EXAMINATION

BY MR. TIGUE:

Q Mr. Schurtman, you have testified this afternoon about facts which are five years old, is that right?

A That's correct.

Q In those five years have you represented other clients?

A Yes, I have.

Q Many?

A Very many.

Q You have looked at many, many documents over the years?

A Yes.

Q IS that part of the reason why you have some difficulty recollecting some of the questions which were asked of you by Mr. Mac Donald?

A That is correct.

MR. TIGUE: No questions, your Honor.

THE COURT: Thank you, Mr. Schurtman. You may step down.

THE WITNESS: I promised Mr. Parker I would bring these files back.

MR. MAC DONALD: With the exception of the exhibits which have been received in evidence, we have no objection to Mr. Schurtman's taking them with him at this time.

MR. TIGUE: Would you consent to having Mr. Schurtman take them, have a copy xeroxed and they could keep the originals?

MR. MAC DONALD: I think we have only a single page, Exhibit 13.

With Mr. Tigue's permission, may we keep Exhibit 13 in court?

MR. TIGUE: Yes.

MR. MAC DONALD: Mr. Schurtman, Mr. Tigue just consented to 13 remaining in court.

THE WITNESS: Would you put a note in the file indicating it has been removed?

(Witness excused.)

MR. MAC DONALD: Your Honor, we call Miss Daniti.

TERESA DANITI, called as a witness on behalf of the government, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MAC DONALD:

Q I would like to ask you frst of all, are you Mr. Leonard's secretary and have you been his secretary since 1972, in the spring?

A Yes.

Q I would like to hand you Government's Exhibit 4 for identification and ask you if you recall preparing the original of that letter on or about November 8, 1974?

MR. TIGUE: I object to that, your Honor, It is a letter which purports to be addressed to Mr. Jacob Lefkowitz, L-e-f-k-o-w-i-t-z, and at that time Mr. Lefkowitz was Mr. Leonard's attorney in this very case. This purports to be a communication between Mr. Leonard and his attorney and if he needs the stenographic services of his

secretary, I think that that as well comes within the privilege. Whether or not Mr. Lefkowitz gave this to Mr. Mac Donald is certainly not a waiver because it's not the attorney's privilege to waive. It was a communication between Mr. Leonard and his lawyer. There are documents apparently which he intended to be turned over to the government in this letter. I know that to be the case. My position with respect to those might be different. But if the man has to communicate with his lawyer through the services of his secretary, I believe that's privileged.

THE COURT: I agree with you in principle on that. How about that?

MR. MAC DONALD: I'd like to identify the letter and the documents that are referred to in the letter and then I'll apprise the Court the circumstances -- well, in the first instance, the government's position is, as the letter in the first sentence indicates, it was intended as a disclosure document. Government's Exhibit 2 before your Honor is the subpoena duces tecum addressed to Mr. Leonard in his corporate capacity, which gave rise to a production which occurred in this case back in November. That production --

THE COURT: Are you only offering this for the very first paragraph in the letter, in effect to show the document went to Mr. Lekowitz and then to you?

MR. MAC DONALD: No, sir. The witness, I think, participated in the preparation of two separate packets of materials which contained two relevant documents. Relevant to your Honor's inquiry today. I wanted her to identify the document in your Honor's hands as a letter that she typed at Mr. Leonard's suggestion and then identify two further exhibits as being further documents included in the mailing to Mr. Lefkowitz.

THE COURT: The problem I have is that on the state of the record before me, I would think that this was a privileged communication, Exhibit 4. It may well be that this is part of a pipeline of transmission of certain materials to you, but the -- you take the top of the second paragraph. "Please note that I was doing this," that and the other. "I have this, I have that," and explanations. Those, it would seem to me, are attorney-client communications that would be privileged. That's why I'm wondering what you are after here is not the contents of the letter so much as it being a covering letter for some documents that ended up coming to you.

MR. MAC DONALD: Yes, sir. The letter did as well.

THE COURT: This letter did as well?

MR. MAC DONALD: Yes, sir.

THE COURT: You got this letter?

MR. MAC DONALD: That letter was handed to me by Mr. Leonard's counsel of record, Robert Freed, Esq., on or about November 8, 1974.

THE COURT: That's a different picture.

MR. MAC DONALD: With two packets of documents.

THE COURT: How about that, Mr. Tigue?

MR. TIGUE: I think the fact that Mr. Freed erroneously enclosed this is of no importance at all. What happened here is the government served a subpoena. Apparently Mr. Lefkowitz has a conversation with Mr. Leonard. Mr. Leonard gives him a letter saying, here are some documents and the documents are to be produced pursuant to the supboena.

The underlying communications he has with his attorney in the form of a letter or oral are, I think, privileged. The fact that the lawyer follishly gave this to the government, I think is not a waiver of the privilege. It's Mr. Leonard's privilege to waive. It seems to me that if you have a lawyer who is not terribly careful about his communications with his client, it really shouldn't harm the client. I persist in my objection to it, that this underlying communication is privileged and I object to its admission into this hearing.

MR. MAC DONALD: Since this is a hearing with respect to the ultimate production of a contract which Mr. Tigue has in his briefcase, that the question can be whether or not this exhibit is properly identifiable by the witness --

THE COURT: Let's take this one step at a time. I will go that far.

Miss Daniti, did you type this letter?

THE WITNESS: Yes.

Q Did you do so from stenographic notes which you took from Mr. Leonard when he was dictating the letter?

A Yes.

MR. TIGUE: Your Honor, do I have a continuing objection to this line?

THE COURT: Yes.

Q Did you participate also in the xeroxing process and in the collection of documents to be transmitted with the letter?

A I don't know if I took all the pages to be copied out myself or if I copied all of them myself.

Q But do you remember doing some of them?

A Yes.

Q I would like to show you two exhibits, which I showed you earlier today in my office, Government's Exhibit 3

for identification and Government's Exhibit 10 for identification, and my question is, do you remember enclosing -- well, take them one at a time. The one on the left has a yellow tag. Do you remember enclosing that exhibit or another copy thereof in the mailing to Mr. Lefkowitz?

A I'm not sure.

Q With respect to the one on the right, will you examine the writing which distinguishes it from the one on the left in the upper right hand corner, and the marking. Are you able to tell us if you performed any services in respect of that exhibit in connection with the mailing of the letter and the enclosures?

A I might have.

Q Do you think you might have?

A I think so.

MR. MAC DONALD: We have nothing further of this witness, your Honor.

Let me ask one further question.

Q Would it refresh your recollection that the document which you just referred to and have in your right hand was sent to Mr. Lefkowitz bore original ink notations as indicated thereon and not in whole a xerox form as it appears before you?

A No.

MR. MAC DONALD: We have nothing further, Judge.

THE COURT: Any questions, Mr. Tigue?

MR. TIGUE: No, your Honor.

THE COURT: Thank you. You may step down.

(Witness excused.)

MR. MAC DONALD: Your Honor, we would offer Exhibit 3 and Exhibit 10 and Exhibit 4.

Our offer with respect to Exhibit 4, Judge, is that your Honor take it subject to appropriate assertion of privilege with respect to all matters therein as to which your Honor concludes there was an intention to disclose to obtain legal service and all other matters are deemed admitted in evidence without that limitation. This is not where we have a jury and your Honor has to make a determination instantly about what's properly protected and what's not.

Our motion, Judge, is for the original of Government's Exhibit 10, which Mr. Tigue has, and I should before resting, tell the Court that I think as already indicated, I received on or around -- I think I should go back one step. Your Honor asked me to place on the record at a pretrial conference held in this case on September 13 when we did not have a court reporter present, the fact that you had made an oral modification of your written order on

defendant's motions by deleting the word oral, "o-r-a-l," from the scope of your Honor's order requiring the government to produce the defendant's prior statements.

In addition, at that same pretrial conference, as your Honor may recall, your Honor fixed the trial date, I believe, at November 4, and fixed October 22 as a date by which the government's discovery obligations would be satisfied, including the presentation to the defendant's attorney at that time of record, Jacob Lefkowitz, of all the exhibits which the government intended to use in its case in chief, an obligation which the government said it would undertake in the underlying papers and at that time the defendant would likewise exhibit his exhibits in chief.

In addition, that was the date on which subpoenas duces tecum could be made under 17 -- Rule 17, made returnable to expedite the trial of the case.

After there was a delay from the original November 4 date until December, that date, October 22, was extended by agreement of counsel, but on or around November 8, Mr. Freed produced under his obligation under the subpoena and under the order of this Court, the documents, among the documents, Government's Exhibit 10, the original thereof, and allowed me to take it to a xerox room and make a xerox and I returned the original to him. He also

produced Government's Exhibit 4, the cover letter.

Our application at this time is for production once again of the original of Government's Exhibit 10 and the basis is -- well, I'm prepared to rest the government's case with that statement of fact with respect to the history of production and allow Mr. Tigue to go forward with respect to any defensive evidence he wants to go forward on.

THE COURT: Let me reserve decision on 4.

Any reason -- 3 and 10?

MR. MAC DONALD: 3 I have no application with respect to, Judge. I have, I think, inadvertently what was considered the original for purposes of that production, and I have no further application. It is only the original of 10 which the government now requests.--

THE COURT: The original of 10 I assume, consisting of all the papers?

MR. MAC DONALD: Of all the pages. The particular pages relevant in your Honor's copy that has Exhibit C typed on it on page 6.

THE COURT: Mr. Tigue.

MR. TIGUE: Your Honor, I gather Government's Exhibit 3 is not offered. Government's Exhibit 10 I object to and I object on the grounds that first of all, I don't really see the relevance of this to the underlying motion.

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The underlying motion is to present the contract which the government alleges to be on corporate property, so whether or not these copies were produced by another attorney, which I am a little bit at a disadvantage in that I wasn't in the case at the time. I don't know that Government's Exhibit 10 in evidence helps the government's case at all.

I have the contract here, which I'm prepared to mark for identification or as a Court exhibit for the Court to take a look at if it so desires, but it seems to me the burden that the government has in enforcing this subpoena is to prove that in addition to all of the records we have voluntarily produced to the government, and there are quite a few, we have in addition two additional documents. One is a conformed copy of the original. The other, as far as I can tell, it does not exist or I can not locate it. There is another copy of the very same contract, the third copy which is a marked-up copy which was used back in 1967 for the employees of Mr. Leonard who was doing business as an inividual, as the very face of Government's Exhibit 3 and 10 indicate.

It seems to me that the government has not carried its burden here to show that the original contracts, which I have, are anything but the personal property of Mr. Leonard. It's true that the corporation would have a

right, they would have a chosen action, if you will, which would be assigned under the terms of the assignment and I have no dispute whatever that all of the physical assets and chemical processes and whatever physical assets or intangible assets were transferred to the corporation, the original document was retained. Miss Daniti said that the files, I believe, were maintained by Mr. Leonard, and I think the logical extension of the government's position here is that every piece of paper that Mr. Leonard has that was generated in connection with his proprietorship is now the property of the corporation and I don't think that was intended by the document. The purpose of the document was to breathe life into a corporation which already existed, to give it a corporate operating existence for the earning of income, incurring expenses and that kind of thing. I think the contract here is a privileged document under the Fifth Amendment and that the government is not prejudiced in any way by losing this motion because it seems to me that if what they have stated to the Court this afternoon is true, they could call Mr. Lefkowitz , they could call Mr. Freed, or they could call Mr. Mac Donald to prove that these documents were turned over.

The whole point that we are arguing about, your Honor, I realize when you get prepared for trial, you under-

stand the facts more than maybe other people, but if your Honor would direct your attention to Exhibit 10, the second page, which is the page that says page 6 on mine, the entire-- the second page which is called page 6, it has lineouts in the center of the page. Subparagraph E, that is the very central information in the entire case, your Honor, because the government will claim that that lined-out provision was never negotiated out by the parties. That some $80,000 was received under the terms of that provision and that Mr. Leonard intentionally excluded that from his income tax returns for the two years in question.

There is evidence in their files that the contract was exhibited to an agent, at least that's what's claimed. Apparently these copies have been given to Mr. Mac Donald in the course of his complying with the subpoena. The government has every tool available to it to make an attempt to offer this document in evidence at the trial. To further require and to take the risk that this document, indeed, is privileged, seems to me to be a risk not worth taking in the circumstances.

I believe that the rights and the obligations under this contract are clearly the property of the corporation along with the other assets. The paper itself, which I would guess the government seeks, not only to show

to the jury this lined-out provision which they can do anyhow.

My guess is that part of the use to be put is to make holes in the documents so they can be tested chemically for whatever purpose there may be. Whether that could be done in time, particularly if we are going to trial on Monday, I don't know. I would maintain the position and the objection I have to Government's Exhibit 10 really is to the underlying motion here to compel production of these two contracts.

If your Honor would like, I would mark the copies that I have in my file, which are indeed copies of the original and exhibit them to the Court if that's helpful.

THE COURT: Well, do I understand that -- I am going over something I think I already understand, but do I understand that there was performance by J. D. Leonard, by Leonard Process Company, Inc., which is the assignee of the assets of Jackson D. Leonard, an individual. There was performance by the corporation of some part of this agreement, Exhibit 10? As a matter of fact, there was a claim made as between the -- between the corporation and Union Carbide as to some part of this, either for payment or otherwise?

MR. TIGUE: The entire agreement was assigned,

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your Honor.

THE COURT: Then there was performance under it by the corporation and there was a dispute between Union Carbide and the corporation arising out of this contract?

MR. TIGUE: That's correct, your Honor.

THE COURT: Do I also understand that in response to a subpoena dated September 27, 1974, which is Exhibit 2, that through the offices of Miss Daniti, who typed Exhibit 4; that there was caused to be prepared and sent to the government the photocopy which is Exhibit 10 in evidence?

MR. TIGUE: I don't know that part, your Honor.

MR. MAC DONALD: I think we should mark as the next exhibit, which I offered, the very document that he has in his possession, of which 10 is a photocopy. I was handed that document and I personally made for my files a photocopy and returned the original --

THE COURT: You were handed an original?

MR. MAC DONALD: Yes, sir.

THE COURT: A signed original?

MR. MAC DONALD: Yes, sir. I gave it back to counsel after I xeroxed those pages containing the handwritten indications and it's the return of that exhibit that I seek.

THE COURT: In any event, that was produced

pursuant to a subpoena on the corporation.

MR. MAC DONALD: That's right.

THE COURT: You received that pursuant to that corporate subpoena and returned it?

MR. MAC DONALD: That's right.

THE COURT: And now you want to see it again?

MR. MAC DONALD: Yes, sir.

THE COURT: We will take a five-minute recess.

MR. TIGUE: Your Honor, I think there are several other items which we will bring up this afternoon. It might take a little time. I believe there is a motion returnable. I don't know if it will be heard this afternoon.

THE COURT: I just received them. I don't know whether the government has had a chance to prepare any opposition or not.

MR. MAC DONALD: I have read them and can make an oral disclosure. I am prepared to exhibit the grand jury testimony to your Honor for in camera inspection and I think under the government's view of the cases, ought to be --

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: With regard to the fact that this case is not to start on Monday, but is to follow three civil cases that are starting Monday, this gives us a few more

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days and I will permit the government to brief me in writing Monday or Tuesday on this matter so that I have it in more formal fashion.

MR. TIGUE: I don't mean to delay your Honor's departure, but --

THE COURT: I want to take a recess so I can consider what to do here.

MR. TIGUE: Will I have an opportunity when your Honor returns?

THE COURT: Absolutely.

(Recess.)

THE COURT: Gentlemen, I'm convinced as can be this is a corporate document. Therefore, I'm going to direct that it be turned over to the government. When do you want it?

MR. MAC DONALD: As soon as possible, I suppose.

THE COURT: Mr. Tigue, is there any reason it can't be turned over now?

MR. TIGUE: No, your Honor. I would like to have equal access with the government. I used to work for the government. Sometimes documents -- I mean I really -- I'll turn it over to him this afternoon, because I have it here. I would like equal access with Mr. Mac Donald.

THE COURT: Very good.

Now, you had one other matter?

MR. TIGUE: I had a few matters, your Honor. One mainly because I thought we were going to go to trial on Monday. So I guess the urgency isn't there as much.

THE COURT: Not quite, although civil cases have a way of vanishing like the mists in the morning.

MR. TIGUE: Once they see the eyes of the jury, your Honor.

THE COURT: Yes.

MR. TIGUE: One immediate problem I have which I must tell your Honor I am terribly concerned about. When I came in this case about one month ago, shortly thereafter I sent letters to various witnesses, prospective witnesses that I would like an opportunity to discuss the facts of the case with them in the preparation of my defense of Mr. Leonard.

Among those witnesses were several Internal Revenue Service agents. Some time went by and I didn't hear from any of them and Mr. Mac Donald undertook to represent them, I guess, I don't know if that's quite the right term, and he proposed that he would let me interview them provided that he was present and that he would give various directions to the witnesses. I informed him that I contacted the witnesses directly, it was my intention and my desire to

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interview them without his being present. That is not to say the witnesses could not have their own counsel present, regional counsel or anybody else, but that it seemed to me to be improper to have the government, the very prosecutor in this case, intrude himself upon my own preparation. He said that he understood my request, but he didn't agree with it and that if there were to be any interviews they were to be in his office in his presence and he would decide which questions would be answered.

So yesterday for the first time these witnesses were made available in Mr. Mac Donald's office and we have a record of what transpired, because Mr. Mac Donald thought it would be worthwhile for precision to have a copy of the transcript and I agreed, indeed, Mr. Leonard, I think, is going to wind up paying for the transcript. We have daily copy. We will have the other one I suppose this weekend.

I won't bore your Honor at the moment unless your Honor is really interested, that there were numerous situations where Mr. Mac Donald felt that the questions were improper, they were irrelevant, they were inadmissible, there were any number of reasons why he gave why the witnesses should not answer the questions.

This just happened in the last two days, your Honor, but I gave Mr. Mac Donald a case called United States

versus Gregory and I can get the cite here in a minute. It's a District of Columbia -- it's a Court of Appeals for Columbia decision which says that it is reversible error, the denial of the defendant's right to a fair trial to have the very prosecutor in the case say to witnesses, "Don't talk to him unless I am present," or direct the witness not to answer any question. This might be a little bit of an unusual procedure, but it seems to me that I have an absolute right to go about the preparation of my defense without the prosecutor interfering and interposing himself. in this manner and I would request the assistance of the Court to direct Mr. Mac Donald not to engage in that conduct any further and permit me to examine these witnesses on my own. I can have a reporter present, the witness can have his lawyer present if he wants to.

I strongly object to, number one, Mr. Mac Donald being present, because I am not permitted to be present at the interview of his witnesses and number two, to direct Mr. Mac Donald not to tell the witnesses who to talk to and what questions to answer and not to answer.

I view this as a very serious matter, your Honor; I think it would be a shame for the Court of Appeals to look at this some day and say the government did something improper because it may be that Mr. Mac Donald is doing what he thinks

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is proper under the circumstances, but I view it to be wholly improper and it is substantially impeding the defense of Mr. Leonard, or my defense of him in the preparation of it.

I guess I can't state it any stronger than that. I would ask the Court's assistance here.

THE COURT: Do you have the citation?

MR. TIGUE: Yes, I do, your Honor.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Back on the record.

MR. TIGUE: Briefly, your Honor, it was a case where the Assistant U. S. Attorney in that case told the witnesses not to talk to anybody, including the defense counsel, unless they were present. The defense counsel complained long and loud about this and in advance of trial he went to the judge and said, "Your Honor, here is what's happening," and the judge said, "I can't do anything to help you." Then during the course of the trial he made further efforts to interview the witnesses and the Assistant again interposed himself and I guess he was just making a better record as he went along and the Court of Appeals reversed, saying this is a denial of a fair trial for the defendant.

I am sure Mr. Mac Donald will want to reply.

THE COURT: Does that complete --

MR. TIGUE: I was still trying to find the case. I thought we would be going to trial on Monday. I thought erphaps when we were gathered together this afternoon I could ask a few motions that I would have. One is, I would expect that this case is a somewhat complicated income tax case, your Honor. The agents have audited Mr. Leonard's tax returns, and even his accountant has spent in excess of 500 hours with the agents. It ranged over a number of years. It's true the indictment in this case relates to two years, but I think that the nature of the case and part of the defense will be that the money which was allegedly received under the contract was paid as a business expense to a Mr. Frank Zemlan. I think the evidence will show that the payments, in turn, were passed on to union officials and one of the reasons I would ask for additional challenges is that I would think that there will be a number of people who will be perhaps offended by the fact that money was being paid to anyone which they may regard as illegal, improper, or immoral and I would like an opportunity to exercise some additional challenges. I would respectfully request five, to protect Mr. Leonard against that kind of prejudice.

THE COURT: I'll reserve decision on that.

MR. TIGUE: Returnable with this same motion that Mr. Mac Donald will be submitting answering papers on,

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is the matter of the true bill. I thought it might be worth clarifying what that motion is about. I thought I could do it on my own by going around to the various clerks. I found when an indictment is returned, the indictment itself comes down. On top of it is called what's the affirmative vote. A one-page piece of paper signed by the foreman of the grand jury and it has the charges which the grand jury has voted upon and it has the number of grand jurors present. Not how they voted; just who is present. And that's a document which is required under Rule 6 of the Federal Rules of Criminal Procedure and I would just like to assure myself that number one, there was a sufficient number of grand jurors present to conduct business and number two, that in fact the vote was taken and the foreman did sign the document. I made that in conjunction with --

MR. MAC DONALD: I suggest to Mr. Tigue, we have no objection and apparently all your Honor need do is direct your courtroom clerk to produce that document from the safe and then counsel can all look at it and we will see where we stand.

THE COURT: That will be done.

Mr. Dorsa, will you obtain the same, please, and exhibit it.

MR. TIGUE: In view of the late hour, your Honor,

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I would like to put something on the record.

The indictment in this case has three counts. I do believe Count 3 will be dismissed. That leaves two counts and the charges under those are 72061, Title 26. And I read that statute very, very carefully for the first time and it struck me that it may be unconstitutional and I looked up whether or not it had ever been tested; indeed it had not been tested.

The reason I think it may be unconstitutional is it sort of prohibits thinking. In other words, it it says anyone who signs and makes an income tax return which he does not believe to be true. It seems to me that the Legislature, Congress, cannot make someone's belief a crime, that is, literally read, if the return itself was accurate and he believed that it was not true, he would have committed a crime. I think briefly, I would like to move to dismiss the indictment on the basis that that statute is unconstitutional. I don't have very much in the way of legislative history and I guess I can only rely on the general cons tutional principles, but it seems to me that the manner in which the statute is written may very well be unconstitutional and I would move to dismiss the indictment on those grounds. Thank you, your Honor.

THE COUBT: I will take it under consideration.

Lzd

Anything else?

MR. TIGUE: Your Honor, I think Mr. Mac Donald will answer the primary motion about the inaccurate testimony or perjured testimony before the grand jury and I would think it might be beneficial to the Court if in fact with his answering papers he submitted at least to the Court in camera the grand jury testimony as it relates to this issue.

MR. MAC DONALD: I have no objection to that.

THE COURT: Let's do it that way.

Gentlemen, will counsel come up to the side bar.

(At the sida bar.)

(Discussion off the record.

(In open court.)

THE COURT: We are in 518 starting Monday.

* * * * *

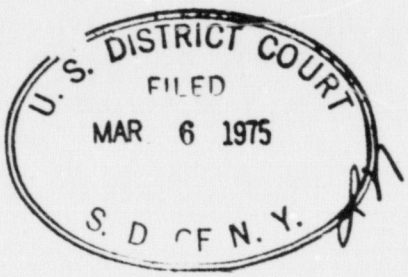
[illegible] (our) skill and [illegible] (our) stenographic notes of this proceeding.

Leon Zuck

Official Court Reporter
U. S. District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	Before: HON. RICHARD OWEN, District Judge and a Jury
vs.	
JACKSON D. LEONARD,	74 CRIM. 599
Defendant.	



New York, January 7,8, 1975

STENOGRAPHER'S MINUTES

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. 74 Cr. 599

JACKSON D. LEONARD, :

Defendant.

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January 7, 1975
3:00 P.M.

B E F O R E :

HON. RICHARD OWEN,

District Judge.

A P P E A R A N C E S:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York
W. CULLEN MAC DONALD, ESQ.,
Assistant United States Attorney

JOHN J. TIGUE, JR., ESQ.,
Attorney for Defendant

ALSO PRESENT:

BORIS KOSTELANETZ, ESQ.

(Case called)

MR. TIGUE: Good afternoon, your Honor. May I now proceed?

THE COURT: Good afternoon. You may. And I welcome your colleague sitting at your left.

MR. TIGUE: He alleges to be my law man, your Honor.

THE COURT: I find that as a matter of fact that is probably true.

MR. TIGUE: Thank you, your Honor, for giving me this hearing on very short notice but the reason I have asked for it, I have three major problems which I would like to bring to the Court's attention, particularly since it may influence the Court's scheduling.

I received the government's requests of charge last Thursday or Friday, but, in any case, I am read them for the first time on Friday evening and I notice therein a request for an instruction on prior and subsequent similar acts.

Prior in this case, your Honor, means 1966 and before, which is a period ten years hence. I, frankly, am in no position whatever to defend Mr. Leonard in connection with those similar acts because I have no idea what they are.

Secondly, subsequent in this case means 1969, because the two years in issue are 1968 and 1969.

I must say I am bewildered by that because the Internal Revenue Service has audited his income tax for '69; it is closed. He paid whatever tax was due and I am unaware of any similar acts which even the government could allege in this case.

As I say, I have no idea of what the government will prove, and this is a highly complicated, financial case, and matters which are ten years old and documents which are discarded or misplaced or take a while to locate, I don't know how I could possibly be prepared in the time that has been given to me, at least since I have gotten the case, your Honor, and I found a case in the Second Circuit which is United States versus Baum, 482 Fed. 2nd, 1325 at 1330, which is a 1973 case, which reversed a conviction where the government introduced some similar testimony which was highly probative at the trial, as I assume what the government will attempt to prove here is in the same category.

THE COURT: Highly what? The door slammed right in the middle of your sentence.

MR. TIGUE: Highly probative, your Honor, certainly of wilfullness, which is the basis for the

admission of these acts in evidence; indeed, if the subsequent acts are admissible in evidence and, indeed, I think in this case, your Honor, the only issue will be wilfullness.

I have just learned of this recently, and I think the Baum case will protect me at least from going to trial without having an opportunity to at least ask the government maybe more formally than I am doing now in a letter or a motion for a bill of particulars.

Baum specifically ordered that the government should have provided a list of witnesses certainly with respect to that issue.

The second matter of some concern to me, your Honor, is, I have talked to Mr. MacDonald today and he informs me that the contracts which were turned over last Friday or Thursday pursuant to the Court's order have been chemically tested and the result is back.

He said he would give me a copy this afternoon. I just bumped into him before we came here. I am sure he will. But I believe tests were conducted by the Alcohol, Firearms and Tobacco people and there is a Mr. Brunelle who has been the subject of enormous litigation. He is an employee of the Alcohol, Firearms and Tobacco section, and there is a case, for instance, where the

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Third Circuit held him to be incompetent, and it took the lawyers in that case a year, I believe, if my recollection is correct -- I have the opinion here -- to prepare a defense to rebut what he intended to prove at the trial, what he did prove at the trial.

It is basically a sampling of inks, what inks were in existence and when the ink marks were made on a piece of paper.

I gather he is the only person in the United States, indeed, perhaps in the world, who purports to be able to render that kind of an opinion, and I think his opinion, first of all, will be subject to great controversy when it is attempted to be admitted, but I frankly am in no position tomorrow or the next few days, and I regard this as a relatively short trial, to be in any position to be rebut what he says or, after I read his report to determine what it is I should do in the way of my own testing to rebut what he has come up with.

THE COURT: Obviously I am not asking you to respond to me, but you knew this was going to be the government's position for some time.

MR. TIGUE: I knew they were going to test it, your Honor.

THE COURT: I assume that your client has

discussed with you the state of facts that pertain thereto, so that you have some guidance in that regard.

MR. TIGUE: I certainly have, your Honor, and without violating any confidences, I can tell you --

THE COURT: I am not inviting you to say a word here, I am just pointing out --

MR. TIGUE: I would like to explain my position, your Honor, that knowing all that I was as confident that I had no problem in this regard and therefore I did not --

THE COURT: Since Mr. MacDonald says he is going to give you the report, why don't we do that right now and then everybody will know where we stand?

MR. MAC DONALD: I read it over the telephone. It is three paragraphs and Mr. Brunelle's name doesn't appear on it, and this is the first time I have heard of the gentleman.

THE COURT: What is the bottom line, Mr. MacDonald?

MR. MAC DONALD: That the inks used in altering or modifying the exhibit, there were at least two or maybe a third different ink used for different portions. That is the bottom line. All inks were in existence and had been manufactured for years and the man purports to render no opinion as to when they were placed on the paper.

MR. TIGUE: Well, the opinion, as your Honor says, the bottom line, the man takes a stand, "I have examined this and the other thing. Here is my opinion ."

I don't think it is so easy a matter for me to rebut that.

First of all, I would like an opportunity to read it. Mr MacDonald did read it to me over the phone. The point is I believe I will need some time, at least I would have my own examiner -- it took Mr. MacDonald three or four days to have it examined -- to counter this specific point.

THE COURT: I don't know what he is going to use it for at this point.

MR. TIGUE: Well, I am not sure I do, either, your Honor, but I guess it was done for the purpose of getting a witness on the stand to testify that my client made markings on that and subsequently delivered it to the Internal Revenue Service for the purpose of concealing income and so forth.

But this is not just a imaginative defense counsel's idea, your Honor, not that I am so imaginative, but in United States versus Kelly, a Second Circuit case, where there was some electronic analysis test introduced and the defense didn't learn about it until the day of

trial or the preceding day, which presumably is today, in my case, and the Court held there that it was a reversible error to force the defendant to trial without an opportunity to defend himself on that rather important issue.

I am prepared to put all these in writing, your Honor, but I don't know -- my secretary is out today -- I don't know if this would have been typed up in time for tomorrow's trial, and I will be glad to give the citations to your law clerk.

The third major of concern to me, your Honor, is perhaps the most important of all, and it relates to an interview I conducted of Mr. Mortimer Laski. Mr. Laski is a Revenue agent or he is now an attorney for the Internal Revenue Service, but at the time of this case he was the Revenue agent who began the investigation.

I also have been given some advance 3500 material, some of his fraud referral reports and the documents that are attached thereto.

In sum, those two documents which I will submit to the Court -- I believe his testimony already has been submitted -- shows that he was a member of what is called the Foreign Bank Account Project for the Internal Revenue Service and as a member of that team he was assigned the Leonard case. He went to Mr. Leonard and

asked him if he had a Swiss bank account, which he claims Mr. Leonard denied.

Some months thereafter he came and asked Mr. Leonard for an affidavit to that effect, which he will allege was given to him, and in addition, he conducted an audit and referred the case to a succeeding Revenue agent with the idea that there would be a prosecution and that he did assist in the preparation of a fraud referral report.

And I learned of this yesterday, your Honor, for the very first time.

Now, the motion that I would have, and if I had the time to type it up I would certainly do so, is that on the firsthand I would move to suppress that statement as obtained illegally on two grounds:

One. I would state that Mr. Laski was acting not in the capacity as a Revenue agent, but in the capacity as a special agent, that is, the law enforcement officer of the Internal Revenue Service, and that he was acting in sort of an undercover capacity, going to the taxpayer and without giving him any warnings of any kind, asking him to make these statements.

Mr. MacDonald have given me in advance some of the exhibits the government intends to offer. Among

the exhibits are the affidavit which allegedly was given by my client.

The cases, I think, are very strong on the point that it is impermissible to have a Revenue agent who will perform the functions of a special agent for the purpose, without or with the effect of not warning him in advance as to what his rights are, and there is a special procedure and there are cases which say if the IRS wanders from that procedure, the statements and the evidence they get from that are suppressible.

Now, secondly, the problem here, I believe, is that there is a strong indication in this case that the case resulted from what I would regard as and would hope to establish to the Court as an illegal mail cover or mail watch.

I have interviewed Mr. Leonard's secretary, Mrs. Isabella Hewitt, and she has told me she has been questioned whether or not Mr. Leonard has received mail from Switzerland and what was on the envelope and all the identifying matter around it.

My client is prepared to submit an affidavit that his mail, especially from foreign sources during the period in question, was eratic and delayed and that he complained to the Post Office close to where he lives as

to the delay and they, of course, said there is nothing they can do about it at the moment, but, as I said, this was true during the period of time in question.

In addition, Mr. MacDonald has asked several witnesses what knowledge they had of the existence of a Swiss bank account on behalf of, in the name of Mr. Leonard.

Now, once I got this information, I got in early this morning and I did a little research on it, and it seems to me there is perhaps some good law which supports me on this, and that the mail survey itself perhaps is not per se illegal, but that if the mail is delayed or if there is improper use made of this material, that it would seem to me that the evidence obtained from that would be suppressible.

Now, there is a case in the Second Circuit, United States versus Costello, the famous Costello case in 1958, where there was a mail cover, and the Court said, after an extensive hearing to determine who authorized it, under what circumstances, what was done with the mail, how long it was delayed, if at all and so forth, found that it was not sufficiently delayed to warrant a dismissal of the indictment or the suppression of the evidence obtained from there.

THE COURT: Is this the case with Jerry Walpin

years ago?

MR. TIGUE: I think Judge MacMahon was the assistant on the case, your Honor, 1959, Frank Costello, if I am not mistaken.

In the Otto Kerner case, which was recently finalized in the Supreme Court, and Judge Kerner, I think is presently incarcerated, the same motion that I am making now was made in that case, and, frankly, I only had time to xerox what the Court ordered in that case, but it was essentially the same motion.

It said, "Defendant's alternative motion for an order requiring the government to disclose all facts surrounding a mail cover and any other mail cover imposed on the defendant and any direct or indirect use thereof is sustained."

And here is what the Court ordered the government to produce:

"The government is directed to state, for the use of the defendant, the following:

"One. The full extent and duration of the mail covers.

"Two. The circumstances under which it was instituted, including the names, the positions of all persons who authorized it.

"Three. The procedure by which it was instituted, including the names and positions of all the persons involved therein.

"Four. The purported justification for its institution.

"Five. The information it produced.

"Six. The names and positions of all persons to whom such information was transmitted and the date of the transmission."

And lastly:

"Seven. The use which was made of such information."

It seems to me, your Honor, that that would require something of a hearing of substance to determine those matters or at least it would take the government some time to comply with that, and I would formally request that in this case that same information be provided and the reasons, if it can be shown at the hearing that the mail, in fact, was delayed, I would submit to the Court that there was, under those circumstances, if in fact it was delayed, there would be a clear violation of the Fourth Amendment to the Constitution, perhaps the First Amendment, and indeed the right to privacy; Swiss law would be violated and at first I thought that that was

not perhaps the strongest point, but there was a recent case, I think Judge Mansfield wrote the opinion, where someone who was kidnapped or violated the laws of Chile was brought to the United States for trial; the conviction was reversed and he was sent back.

It seems to me that there is a possible violation of the Post Office Regulations and the United States Criminal Code, Title 18, Section 1701, 1702 and 1703.

I frankly discussed this case somewhat with Mr. Kostelanetz, so that I could get my facts straight on the law and what not, and as he claims to be my law man, the Swiss law is clearly violated by the conduct engaged in here.

It comes at a time when the CIA has its problems in the press and the Swiss-American treaty is presently before the Swiss parliment or whatever their form of ratification is.

It may be that they are unprepared to give us information or they wouldn't want a public disclosure of it, but I think that step is perhaps further down the road, and Mr. MacDonald, I guess, can look to that.

But I have a Paragraph 5 in my notes which says, "I want," and the things that I would respectfully

request the Court, your Honor, is certainly, as a minimum, the information which was ordered in the Kerner case and a hearing to establish, to determine whether or not the government's case is tainted from beginning to end, that is, if the government illegally opens your mail or looks at your mail, and from that they develop a criminal case, I would certainly hope to persuade the Court that that illegal act as all of the evidence derived therefrom would be tained, and the government would not be prepared or not be able or permitted to go forward with the evidence.

Secondly, with respect to the chemical test, I am frankly in no position at the moment to state much of the position except to say that I am not at all ready to start a trial tomorrow if I have to spend my time, instead of preparing the cross examination or the direct examination of my client and witnesses, to run down the chemical test. I frankly don't believe I am prepared on that, your Honor.

Secondly, with respect to the similar acts, I am at a complete loss on that, your Honor. There are an enormous number of records on this case. This is not an easy case. There are all kinds of purchase orders and cash receipts book and cancelled checks, an unbelievable

number of records and every time I get to take a look at some more records from Union Carbide or Tredwell Corporation, which are some of the corporations involved in here, and yesterday Mr. MacDonald was courteous enough to give me some of the 3500 material in advance, I see that they allege that there is omitted income in other years and what not, which I haven't even dreamed of, and I haven't even discussed with my client, and I am in no position to defend those if the government is permitted to come in and, in effect, ambush me at the very last minute when I have no time to prepare a defense on those issues because, at best, I am prepared to defend the charges which are contained in the indictment, and to have this presented to me at the last minute, I don't know how I can contend with it.

I just have the notes which relate to the other pending motions, and I guess I shouldn't bring those up until Mr. MacDonald has an opportunity to respond.

THE COURT: Mr. Tigue, let me be sure now we are well categorized here.

Your first application is for some relief based upon your understanding that the government intends to prove similar acts against your client at some point of an unknown quality.

MR. TIGUE: Yes, your Honor.

THE COURT: That is one. The second one is, you want to be able to deal with the ink aspects of the original contract.

MR. TIGUE: Yes, your Honor.

THE COURT: I am making this deliberately sort of vague because I think you are groping before me as to just what you want to do and so I will sort of leave it in that kind of language.

The third thing is you have a question of suppressing a written statement taken by a Revenue agent who you say was acting in an undercover capacity as a special agent and took a statement without giving Miranda warnings, in effect, as required by IRS regulations, if this thing switches from civil to criminal.

MR. TIGUE: Yes, your Honor; indeed, there was an oral admission as well.

THE COURT: And the fourth thing is this mail cover and whatever flows from it.

MR. TIGUE: Yes, your Honor.

THE COURT: Mr. MacDonald, you have got a mouthful to deal with here. I will hear you on that.

MR. MAC DONALD: I think the record ought to contain -- and I have not put these thoughts down on

paper in advance so I ask Mr. Tigue to break in and correct me if I am wrong -- ought to contain a report to the Court with respect to the efforts that have been made to prepare Mr. Tigue in the thirty days that have elapsed since Mr. Leonard requested your Honor for a continuance to substitute Mr. Tigue for Mr. Lefkowitz.

During that period of time, although the motion period was long since over, although the bill of particulars had long since been provided to counsel, Mr. Tigue and I have, in effect, gone back to step 1, and I have allowed him, in the sense that he wanted to begin this case without any hurdles, to make long lists of things he would have moved for if he had come in at the beginning, and I have made long lists of things that I thought I might be able to get out of him, and we have repeatedly attempted to settle the open issues by exchange of information.

The net effect of all that, as of this minute today, is that he has taken depositions under oath, a procedure I don't think I will ever repeat, but for whatever reasons he received that privilege, of six or seven IRS Revenue and special agents, and he has their sworn testimony as to their best recollection.

In addition, he has the 3500 material in the

form of the auditors' work papers that each of the three Revenue agents who put something on a work paper in this case noted in respect to the government's case in chief. He has seen all of the documents that I have subpoenaed from third parties at the grand jury stage. Union Carbide produced some 3,000 documents, and I just turned my entire file over to him in that respect. And yesterday, indeed, he was able to interview the Union Carbide government witness with the use of the documents and prepare cross examination.

He has been provided with more than he is entitled to in the way of written memoranda of interviews with his client and also with his client's representative.

Were it not for the reference in the instructions, in the proposed instructions to "prior and subsequent similar acts" I don't believe he would be asking for a continuance on the basis of his general discovery.

That category of evidence is something I am sure he is sensitive to and has always since he left the United States attorney's office and from earlier time.

In a tax case you can expect on the issue of wilfullness prior and subsequent similar acts, and it is only because of the Baum case and the footnote in the Baum case that he protects the record by making his motion

for a continuance on that basis, I am sure.

The Baum case has not been -- and I haven't informed myself recently, but I know my office has an inner set of collected materials and that has not been widely followed, the dictum in the footnote.

Secondly, I believe it was the District Court judge from another district who wrote the opinion -- I am not sure -- even though it is a Second Circuit opinion.

I think the government's position is and remains that, first of all, there was no motion until today for a bill of particulars in respect to prior and subsequent similar act evidence. And the government's position is at the eleventh hour and fifty-ninth minute such a motion is tardy and really out of order, and, in any event, even if the motion had been timely made, I don't believe that that opinion reflects the state of the law in respect to having to delineate the similar acts or the subsequent acts. At most, I believe it requires the disclosure of the name of a witness who is in federal custody and thus is available for interview by the government producing such a witness.

I don't think that there are any witnesses in that category in that case.

In the Baum case he was a prisoner in Danbury; he was writted in at the last minute to provide testimony about a previous robbery, as I recall.

With respect to the ink results, the test, as I understand -- I witnessed by telephone the test -- began at 9:30 yesterday morning and was concluded by 2:30 in the afternoon. Iam confident that Mr. Tigue has the names or can shortly inform himself of the names of competent laboratories to perform similar tests in the same time frame and that shouldn't be a problem.

At the soonest, the government will offer the testimony of the man who conducted the tests at the tag end of the government's case in chief, which is seven or eight days away, and in the interim I am sure he can get his own expert to repeat the tests if he desires.

THE COURT: Mr. Tigue, aren't Osborne and his ilk around and available?

MR. TIGUE: They are, your Honor. I have contacted Mr. Osborne in advance of any testing by the government and they tell me they don't do that kind of thing. Indeed, I am shocked at the number of firms or the lack of firms who are prepared to do this. Believe me, when I say that the Alcohol and Firearms and Tobacco people -- even though I don't see Mr. Brunelle's name on

here -- are the people and they are the people, indeed the only one I know of for sure who can get on the stand and say under oath, "It is my opinion and I could tell you that with a reasonable degree of certainty," and Osborne does not do this, your Honor, so I wanted to see what would happen here.

THE COURT: I see. Go ahead.

MR. MAC DONALD: By the way, your Honor, I don't invite the Court's serious consideration of it, but the admissibility of such scientific testimony really follows from the admissibility of several other pieces of evidence, and it may be that it is not admissible in the government's case in chief.

In any event, I direct your Honor's attention to the "P.S." in the letter, the Lefkowitz letter, as to which there was an assertion of attorney-client privilege, in which Mr. Leonard made statements about the document that was tested, and unless and until the statement is put in it can't be shown.

Finally, with respect to the allegations that there was an illegal mail watch --

THE COURT: How about the Revenue agent taking the statement at a time when he should have alerted the taxpayer that criminal consequences would flow from it,

which I think is, in essence, what Mr. Tigue is saying.

MR. MAC DONALD: I have not informed myself with respect to the applicability of Miranda warnings in the context of an IRS investigation.

Mr. Tigue has told me that there are cases. When I asked him for an example, he said there were cases where the IRS put a dummy employee into a man's corporation and let him work there for six months and find out what was going on from the inside; that the information so obtained was not properly useable. If there is nothing between that and the straightforward case where the Special comes in and gives full warnings --

THE COURT: I could be wrong in this, but I have some vague memory that when a case moves from the civil to the criminal side, the taxpayer has to be informed of that fact, and I don't know whether it gets down to the full blown Miranda situation or not, but I seem to remember some case saying that if you shift over and it becomes a serious criminal possibility, the taxpayer has got to be told.

MR. MAC DONALD: Clearly, I think that the fraud referral, which is a produced document he has received, is dated a year after, a year after the oral statement and nine months after the written statement.

THE COURT: Then do we have --

MR. MAC DONALD: Until such time, there was no special agent ever assigned the case.

THE COURT: Do we have to told a little hearing on the admissibility of that at some point or not?

MR. MAC DONALD: I think just on the barren allegation that a man -- well, I'm not sure what the allegation is. If the allegation is he was a disguised special agent -- I don't know what that is. If he wants to try to prove it, I welcome a statement of what would be relevant on that score and what he would propose to prove. I would have to just invite a fishing expedition about the agent's notions of which laws he was enforcing when he was asking this question or that one.

With respect to the allegations concerning an unlawful mail watch, I have just done the research this morning on the subject of mail watches. The Costello case seems to be the leading case. It has been followed by three or four other circuits.

I am advised that there is no decision suggesting -- maybe "suggest" is the inappropriate word -- there is no decision holding that to look at the outside of an envelope only constitutes an invasion of privacy and that

anything that stems from the information obtained from the outsid e of an envelope cannot be used in the normal processes by the law enforcement department.

The set of interrogatories which Mr. Tigue read to the Court was followed in the opinion that is published by the Court's conclusion that no unlawful mail watch -- I will hand the Court the opinion rather than characterize it. It cites the existent law from the various circuits on the subject.

THE COURT: Let me see it.

(Handed to Court)

THE COURT: Well, what about the applicability to me of this direction that Leonard here be informed as to whether there was a mail cover and the details of it?

MR. MAC DONALD: I am prepaerd to inform the Court, I hope in helpful fashion, certainly not to the detail and to this extent that the judge in Illinois asked for information. I have in my possession photostats or photographs of half a dozen envelopes addressed to Mr. Leonard both at his home and his home at Union Plaza. I will make those available to counsel.

I am informed that those were made back in 196 -- well, the time I am uncertain about. I think in the early months of 1968 and 1969 by the postal authorities,

that is, the mail was passing through on the way to being delivered to Mr. Leonard.

I don't believe any envelope was ever -- I am informed that all that was done that a photostat was taken of the envelopes in question.

The information with respect to those envelopes followed by several months an informer's report to the IRS. The informer's report, in substance, led to the fact of this case. It said, in essence, that Mr. Leonard was diverting income by getting kickback checks from a sub-contractor that he endorsed over to the sub and as a consequence of that informer's report, the case was assigned out to an audit group to see if there was any truth to the allegations.

Coincidentally, at the same time, the mail cover had kicked out information concerning Mr. Leonard's having correspondence with what were believed to be Swiss banks in the form of those letters, and I think two months after the case was assigned to audit on the Union Carbide-Tredwell allegations, it was also made clear that the mail cover had brought out some more relevant information. It caused a different Revenue agent to be assigned. Nevertheless he was a Revenue agent. He worked in a group that had as its primary job the development of audit techniques

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which would disclose the use of secret foreign bank accounts, and in the course of trying to develop such audit techniques -- I think, by the way, they were unsuccessful in this case -- in the course of trying to develop such audit techniques at some point the Revenue agent was permitted to inquire about the banking practices of the taxpayer, orally.

Well, I guess he made the normal inquiries at an earlier time. Where do you deposit your business receipts? Is that the only bank account?

At some later point in time he was allowed to ask the further question, did you have a foreign bank account and receive an answer to it.

And then at a much later point in time he was permitted to request a written affidavit on the subject.

I think that is what the proof is likely to be if we hold a hearing on this subject, and there are, of course, details which -- I don't know why the judge would order all the names and addresses of all the people whose letters were photographed to be disclosed or all of the people who received the information. If it were clear that there was illegality involved, if there had been a single district or circuit court holding that such

a view of another man's mail is unlawful, I can see how there might be some concern, but in this case there was a wholly independent, untainted lead right on the money, and I think we can do without a large witchhunt that consumes a great deal of time.

I am not sure that I have a suggestion as to how to shorten the inquiry. I think I would want to add only one further point. Mr. Tigue has read the cases and particularly the Costello case when he suggests that his client is prepared to sign an affidavit that his mail was delayed. The Costello case discusses the allegations there that there was an obstruction of Mr. Costello's mail because of an identical mail cover and that it was delayed in delivery and the Court factually affirmed the District Court's rejection of that. It didn't really indicate affirmatively that if there had been a delay of a few minutes to photograph an envelope that such would be occasioned to hold extensive taint hearings in advance of the trial.

THE COURT: Let me ask you this, going back to point number 3, having to do with the statement, if a case comes in to IRS where the informer says a man is getting kickbacks from a sub-contractor, isn't that

case prima facie criminal?

MR. MAC DONALD: I guess it would depend upon whether he reported. Prima facie you would have to go to see what he said in his reports and you would have to go beyond Schedule C to look at the cash disbursements and receipts ledgers.

THE COURT: Your civil Revenue agent side is normally to dispute with taxpayers legitimate differences in terms of law or interpretations of fact or --

MR. MAC DONALD: We have the expert in the room. I am not an expert, Judge. I take it the Revenue agents get leads from disgruntled employees or wives or ex-wives or otherwise and the Revenue agents follow those up until such time as they either have corroborated or confirmed the accuracy of those reports and it is at that point that they --

THE COURT: It still starts out as sort of if it is going to be anything, it is going to be criminal.

MR. MAC DONALD: I really don't know that that is the case, Judge. A Revenue agent is assigned the job of working it up and then if a fraud referral is appropriate, a Special looks at the fraud referral report and either turns it down or does more work and a violation, as your Honor knows, I am sure, a violation of Internal

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Revenue laws does not inevitably lead to this room. There are a lot of cases where there is a lot of criminal behavior that ends up being settled civilly at various stages of the proceeding, sometimes before Specials come in.

THE COURT: I will get from some gentleman in this room, and I am sure you will all do your best to help me, the authorities that bear on what kind of warnings IRS agents have to give and when the law requires that it be given.

All right, now, I take it your thought with regard to this point 4 is that having gone much further than the United States attorney's office normally goes in terms of pre-trial disclosure, given the facts of this case, that Mr. Tigue has been in a short time as a substitute counsel, that you feel that the disclosure of the envelopes that you propose to use on the trial or that you have available for such use in one way or another, that was about as far as you think that disclosure ought to be made.

MR. MAC DONALD: Yes, sir. I have no authority to say what we did was unlawful and we shouldn't.

THE COURT: I understand your position.

Now, anything else? I am going to take a

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five-minute recess here and give some thought with my colleagues here as to how we deal with this.

MR. TIGUE: May I reply, your Honor?

THE COURT: You may.

MR. TIGUE: As long as Mr. MacDonald is taking bows for cooperation, I will take one myself.

I think, in the spirit of joint cooperation, I have given him all the corporate documents that he has a right to.

We have sat down and we have interviewed witnesses together and as far as his cooperation goes with respect to other witnesses, I have sent him a letter that I want to interview them, and he insists on being present. He tells them not to answer questions and what not, and my motion is still pending with respect to that.

With respect to Baum, I mean, I don't think that Mr. MacDonald can relegate Baum to a Law Review article.

Judge Friendly was one of the gentlemen on that panel and my guess is he doesn't concur in opinions until he fully concurs in them.

With respect to the ink test, it seems to me that when I was in the office, everyone used to say

the government has vast resources and that usually meant me. In this case it doesn't mean Mr. MacDonald. It means truly the vast resources of whatever testing facilities the FBI or the Post Office people or the Alcohol, Firearms people.

Mr. Kostelanetz has told me, and I am going to get the case for your Honor just as soon as I can and as fast as I can, but there are a number of cases which strongly support the position that once a case has even the possibility of a criminal aspect to it that the Internal Revenue Service's own regulations require that the potential defendant be warned, and there are cases which say if you stray from that, that whatever you learn thereafter is suppressible.

I represent to your Honor I will get those just as soon as I possibly can. I don't think there is any barren allegation, especially after what Mr. MacDonald said about the mail cover and what not.

On the Costello case, there is a factual determination which needs to be made, I believe, at a hearing, as to whether or not the mail was delayed and the facts and circumstances surrounding it.

Now, obviously Mr. MacDonald is making representations in good faith, but he wasn't present; he doesn't

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know if these envelopes were opened, if they were xeroxed, if they were subjected to infra-red lighting or what happened to them.

It seems to me that Mr. Jackson Leonard has no less stature before the law than Court of Appeals Judge Otto Kerner did. If the judge in that case saw it was appropriate under the circumstances -- and I submit the circumstances are evenstronger here after what Mr. MacDonald has said -- he has a right to the very same information, to make whatever use he can of it, and those are the items I read before, and I have a copy of that if your Honor is interested.

THECOURT: No, I have been given one just now.

MR. TIGUE: This was the Otto Kerner opinion, your Honor.

THE COURT: A decision in the District Court.

MR. TIGUE: Yes, your Honor, where the District Court ordered this. It seems to me if these envelopes don't have any return address on them, I mean, what does that mean if someone gets a piece of correspondence from Switzerland? It doesn't mean a Swiss bank. There are lots of people over there. Maybe they do. Maybe they don't. But I think that a factual hearing is required

to determine exactly what the facts of the case are; were the envelopes in fact opened? Were they delayed? Under what circumstances were they taken out of their ordinary stream and --

MR. MAC DONALD: I think I can advise the Court that I was advised that in Switzerland and in this country, many businesses use postage meters instead of stamps and postage meters have little numbers on them and the numbers are stamped on each envelope every time the meter is used, and a Swiss bank employs postage meters that have identifiable numbers and that is the method by which the envelope without a return address is identified to a Swiss bank and so I will show the envelopes --

THE COURT: Mr. Tigue, I think in terms of were they opened, were they this or that or the other, I think you have to come up with some showing fror your client that the mail was opened rather than just turn the Post Office on its ear to show how they handled Mr. Leonard's mail.

MR. TIGUE: I don't mean mail in general. The allegation is specifically to these letters. The Internal Revenue Service apparently took steps to have the postal authorities interfere with Mr. Leonard's mail.

I don't mean to say that I have to bring in all the postal employees where Mr. Leonard lives to prove that. I think that the government has the obligation here to get the agents who caused this, as the judge in Judge Kerner's case did, to explain to the Court exactly the facts and circumstances. Did they xerox it? Did they open it?

I think that showing has already been made by the statements of Mr. MacDonald. Frankly, your Honor, when I was in the office, I handled many Swiss bank investigations, and I see no conflict in this case, but my experience confirmed what Mr. MacDonald said that apparently what they do is they violate the laws in Switzerland by attempting to get the Swiss banks to disclose what American citizens have Swiss bank accounts.

Now, if the Second Circuit sends a citizen of Chile --

THE COURT: They can't ask?

MR. TIGUE: They didn't even ask. What they do is they surrepitiously attempt to get letters in so they get the numbers down and they take all the mail that comes into the United States.

THE COURT: If they can look atthe letters, which I gather is conceded they can, they can take the number off the postage meter, I gather that is legitimate

and if they can trace that through some booklet to a bank in Zurich, you mean they can't write the bank in Zurich and say, "What can you tell me about this?" Isn't that legitimate? Does that violate Swiss law?

MR. TIGUE: One hundred percent, your Honor.

THE COURT: How?

MR. TIGUE: Anyone who solicits or attempts to find out, to determine who has those Swiss bank accounts violates the Swiss law without question,your Honor.

THE COURT: They can't ask?

MR. TIGUE: Cannot even ask. That is a violation of the Swiss law, and if you have a case like Chile, where they send a Chilean citizen back to his country, what about the citizens of our country? Don't they have a right of protection of having American law enforcement officials violate the laws of other countries?

THE COURT: You mean the Swiss law is that nobody can write a letter to a Swiss bank and make an inquiry?

MR. TIGUE: As to whether or not someone has a Swiss bank account.

THE COURT: As to whether someone has an account in that bank, that is a violation of law to write such a letter?

MR. TIGUE: As Mr. Kostelanetz says, if it is done for the purpose of inciting a disclosure of the identity of the holder of a Swiss bank account, it clearly violates Swiss law, your Honor, and I am confident if I have a couple of days here, I can just prove that to you easily because, frankly, my firm is somewhat --

THE COURT: I can it if the law were that the Swiss bank is forbidden to disclose and you get an employee surreptitiously to tell you who. That is one thing. But it seems to me to write the president and say, "Do you have an account in this fellow's name," all he is going to write back and tell you is, "I can't tell you. That is the law."

Mr. Kostelanetz, whom I respect, says it is otherwise, but that is an astonishing situation to me.

MR. KOSTELANETZ: May I give my small example?

THE COURT: Yes.

MR. KOSTELANETZ: I think, your Honor, a case which I heard, in a small town in Switzerland, a private detective decided to find out where somebody had a bank account, which was an illicit thing for him to do, so he got ten Swiss francs and went around to three or four banks to try to make a deposit in the name of, say, Johann Schultz, and the first two banks declined the

deposit; the third bank took it.

That was considered in serious violation of Swiss law in that this was an indirect attempt to obtain what Switzerland considers secret.

THE COURT: Isn't that a surrepitious type of thing, too, in that sense, different from a United States law enforcement official writing openly? I don't know.

In any event, this is a fascinating subject which obviously has bearing upon what we are here to decide.

Go ahead.

MR. TIGUE: It seems to me, your Honor, that with respect to these very envelopes, how they were taken out of the stream of the mail, how long they were delayed, I don't believe that is the defendant's burden to prove that, your Honor. The government has now admitted in court that they have interfered with his mail, that they stopped it, and then xeroxed it, at least.

Now, Mr. MacDonald, I am sure, makes those in good faith, but he doesn't know the facts. He only knows what is told to him.

With respect to the secret special agent issue and the whole mail cover, Mr. MacDonald said that Mr. Laski was permitted to do this; he was directed to do that.

It seems to me it goes to the very issue what it is the defendant is asking here, if there are special agents doing this or if there are people who are coordinating criminal investigations or making directions, the fact that a fraud referral report is made sometime later is absolutely of no significance. You can't get a Revenue agent and put his badge on inside of his jacket and have him go around collecting information as if he were not a law enforcement official when in fact he is.

I think your Honor asked the most telling question of all. Isn't it prima facie evidence if an employee of the United States government goes out to investigate an allegation of receipts, of kickbacks and of a secret Swiss bank account, isn't he conducting himself in a manner which a special agent, a law enforcement official is, and if he is doing that when he walks in to the taxpayer's office, he has to say, "Mr. Taxpayer, I am a law enforcement officer and you have a right to keep your mouth shut and not to give me any docuemnts."

That didn't happen here, your Honor. I think a hearing is required to establish exactly what the facts and circumstances are surrounding how this case began and how it got to be that Mr. Leonard made those statements allegedly.

THE COURT: I see.

All right, we will take a recess for five minutes.

(Recess)

THE COURT: Now, let me just say as a prefatory remark, I think the defendant in this case has had the greatest amount of disclosure that I have had of these and to observe as a defense counsel and as a judge and as an assistant United States attorney over the years, so I want the record to be perfectly clear in that regard.

Nevertheless, I am going to adjourn the trial till Monday morning and I would like to have any further authorities that you want to give me on the mail cover aspect of this so that I can consider that during the morning and try to rule on that during the day tomorrow, so everybody knows where we are at.

I want to be able to do the same thing in regard to the similar act situation and I will endeavor to reach a ruling which can be communicated to you all at the end of the day tomorrow, Wednesday on those two items.

I do not feel that the chemical testing of this document is something that I should intervene in, and I think defendant should make all available efforts

to find his own expert and just get at it, and I think my earlier observations about his awareness that this was in the cards sometime ago fortifies that.

Now, as to the statement taken by the Revenue agent, I think it appropriate to hold a modest hearing on Friday morning, and we will do that in this court at 10:00 o'clock if that meets with everybody's approval.

MR. MAC DONALD: If I might just make a proposal, Judge, this particular agent has flown in here from California and he told me he wanted very badly to go back and begin his Bar Review Course for the California Bar, and he is missing the first week this week. If we are going to keep him here for ten days maybe we can hold the hearing tomorrow and at least let him go back. If tomorrow isn't available --

THE COURT: Tomorrow is fine with me. I can hold it tomorrow. I just thought you would want to do this a little more briefly on the subject, but let's do that and we will convenience this gentleman.

MR. TIGUE: Was that tomorrow, your Honor?

MR. MAC DONALD: I will communicate with Mr. Tigue. If the agent would just as soon stay here, I would like the time to wait till Friday as well.

THE COURT: Why don't you find out about that

and call chambers this afternoon and any time through this week is of equal convenience to me, so I am at your disposal.

With regard to the "depositions" that were taken here as to which I am asked to rule on unanswered questions, my feeling is, Mr. Tigue, you got more than you had any right to expect, and absent of showing before me that these men, who were government agents now -- these are not civilian eyewitnesses to a murder, which is the case that you cited to me, but these are government agents and involved in law enforcement, and absent some kind of showing before me that these agents wanted to speak to you and were prevented from doing that by Mr. MacDonald, and absent of showing that they were not pleased, satisfied and requesting, in effect, that he be there to counsel them during this, I am not going to intervene.

I think before you can demand more of them, there has got to be some demonstration that these people wanted to talk to you and that the United States attorneys' office, in effect, came between them and you, and I don't see that showing here at all.

MR. TIGUE: May I say something, your Honor? I don't know how I can make that showing because when I

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said to the witness, "Wouldn't you really want to talk to me and not have Mr. MacDonald present?" Mr. MacDonald said, "Don't answer that," so I am now unable to even talk to the witnesses. They are sort of foreclosed -- I am foreclosed from making that showing, principally because they were directed not to answer the question.

THE COURT: I wasn't aware that any such questions were asked and unanswered in the depositions, but it seems to me that there is an easy way out of that, and that is to get some kind of statement from these agents on record in some fashion as to what their pleasure was with regard to this testimony.

MR. TIGUE: I agree, your Honor, if Mr. MacDonald would agree, I would just ask that they be brought back and I will ask the questions on the record.

THE COURT: In thinking about this matter, it occurred to me that if he wanted to talk to certain police officials, I can think of certain things that district attorneys would have said to you that I wouldn't want to have my friend, Mr. Knuppel, put on the transcript, so I think this is a situation which, unless there is some showing, and perhaps we should get a statement from --

MR. MAC DONALD: I think we can prepare an affidavit.

THE COURT: -- from these people that this is what they wanted -- I am sure we all agree that that is probably the fact.

MR. TIGUE: I do not agree with that, your Honor, because many times the witness would try to answer my question and Mr. MacDonald would say no.

THE COURT: Well, he is rolling along. You are a very able former assistant United States attorney, probably known personally to a number of them, and if not that way, you are known by name, and you are of good repute, and you are asking questions and they are trying to be helpful, but there are legal considerations that these men want and need counsel on as to what is appropriate.

MR. TIGUE: I say that one of those to Mr. MacDonald that I think they have an absolute right to have a lawyer present if they want to, but not Mr. MacDonald; he has got a clear conflict of interest there. He has got his case to prepare. If they want to bring the regional counsel over or anybody they want, I never excluded that; I specifically invited that; but not Mr. MacDonald.

THE COURT: You just don't want the one man in there who knows what the case is all about because that is what it amounts to, because the regional counsel is not as informed.

MR. TIGUE: What I don't want is for one man who is going to stop me from effectively preparing my defense.

THE COURT: I didn't study each and every lesson, but reading a great number of them, he would cut you off when it got to talks between the agents themselves, "What did you say to each other about the Leonard case?"

MR. MAC DONALD: I think I also solicited repeatedly any substantive conversations, if there were specific ones in mind, so that I might decide as we did in the last of Laski, for example, to allow questions, allow Laski's communications with others, other agents within the agency.

THE COURT: Mr. Tigue, you would agree with me, would you not, that if the agent said, "I don't want to talk to you under any circumstances," that that is the end of it, isn't it?

MR. TIGUE: If that were freely made, I would say I would have to agree with that, your Honor.

THE COURT: So if he said,"I want the D.A. with me" --

MR. TIGUE: Well, at this point, your Honor, he has already been told. He is no longer permitted to exercise his judgment freely.

THE COURT: Let's think about how we deal with that problem, but that is my view of it. I am not going to get further into this and be, in effect, ruling on questions on a deposition, because I don't regard this as a deposition at all.

All right. We will communicate to you tomorrow about these two matters, and you will let me know later today when you want this hearing.

MR. TIGUE: Does the Court still have sub judice the motion with respect to the presentation to the grand jury?

THE COURT: Yes -- no, I don't. I have looked at the slip. Mr. Dorsa got the slip, "Twenty jurors concurred in the return of the indictment and it was signed."

MR. TIGUE: He did inform me of that, your Honor. Thank you very much for that, your Honor. What I was referring to was the motion with respect to dismissing the entire indictment because, one, Count 3 is beyond the statute of limitations and, two, inaccurate testimony or --

THE COURT: No, that I have not decided.

MR. TIGUE: Thank you, your Honor.

(Adjourned to a time to be fixed)

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UNITED STATES OF AMERICA

v. 74 Cr. 599

RE

JACKSON D. LEONARD

January 8, 1975
2:15 P.M.

(Case called)

MR. MAC DONALD: Government is ready.

We thank the Court for giving us an opportunity to call this witness out of order.

We call Mr. Morris as our first witness.

THE COURT: All right.

Now, this is on which of our many problems? This is on the statement?

MR. MAC DONALD: Yes, your Honor.

THE COURT: Very good.

B E R N A R D H . M O R R I S , called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MAC DONALD:

Q Mr. Morris, are you a retired former employee

of the Internal Revenue Service?

A I am.

Q Would you tell his Honor how many years you were with the Internal Revenue Service and your position on retirement?

A I was with the Internal Revenue thirty-one years and when I retired I was Senior Regional Analyst in the office of the Assistant Regional Commissioner of Audit at 90 Church Street, New York.

Q What date did you retire?

A I retired in June, 1972.

Q I would like to direct your attention to the calendar year 1968 and ask you if you would tell us, please, what position you held in that year.

A In 1968 I was part of a two-man task force set up by the Regional Commissioner to investigate the use of foreign bank accounts by United States taxpayers and to see what we could do to come up with some means of coping with the problem which at that time was increasing.

We had started to work in 1967 and this continued through '68 and thereafter.

Q For organizational chart purposes, did you answer to the then-assistant regional commissioner of audit, Mr. William Wolf?

A That's right.

Q And underneath of you were there audit groups in both the Eastern District of New York, Brooklyn, and the Southern District of New York, New York which you directed in that respect?

A Just for this particular project, yes. They were not directly responsible to us. There was a whole line -- a chain of command, so to speak, but for a particular project we had supervision.

Q And was Agent Mortimer Laski, Revenue Agent Mortimer Laski an auditor in the New York or Manhattan group that was acting under your supervision?

A Yes, Mr. Laski was one of the ten or eleven Revenue agents in the Manhattan district who were in this particular project.

Q And was Mr. Hyman Boller a special at the Intelligence Section of the IRS, and did he have some role with respect to this program?

A Yes, he was the other member of the two-man task force. There were two representatives from Audit and Mr. Boller from Intelligence.

We were both working out of the Regional Office.

Q And did Mr. Boller answer to Assistant Regional Commissioner McBride for Intelligence?

A Yes.

Q And each of the assistant regional commissioners answered to their boss, the regional commissioner?

A Yes.

Q And who was that?

A At that time it was Harold All.

Q Beneath Mr. Boller, were there, to your knowledge, special agents whom he directed in respect to this program?

A Yes, there were. Once again, it was an advisory capacity, and supervisory only for that of this project. They had their own supervisors for everything else.

Q Yes, sir.

Now, I would like to direct your attention specifically to the instructions which were given to the auditors working under your direction concerning the con-

tacts they had with the taxpayers and taxpayer's representatives and most narrowly, whatever discussions would be ensuing concerning banking processes.

Can you tell his Honor what the original instructions were in that regard?

A Well, the original instructions that we gave to the particular agents involved were primarily to investigate an in-depth examination, using all the usual audit techniques that they were required to do on any examination plus several pages worth of specific things we expected them to look for or look at in the conduct of these particular examinations.

Q Would a normal audit, not in this program, include the auditer asking the taxpayer to identify those banks into which he deposits his business or wage receipts?

A Yes, that was normal.

Q Was there any variation from the norm in their top area of inquiry?

A No.

Q The auditors who were working under your direction were informed, were they not, that there was a confidential information source indicating a Swiss bank?

A Yes.

Q And were any additional instructions given to

these auditors in respect to the use to which they might put that information in their interviews with the taxpayer or his representative?

A We suggested to them that they keep this information until after they had completed the regular examination, the main idea being that they would probably in most cases uncover some information indicating the existence of this particular bank account.

It was only at the end, after they had uncovered anything of substance, that they were to bring up this item or question as to whether the taxpayer had a foreign bank account.

Q And if I could go back a minute to the beginning, was an overall purpose of the audit groups that you were directing or goal of the program, to develop new and different audit techniques which might uncover the use of Swiss banks by American citizens?

A Yes. We were looking for audit trails, what we would call audit trails, some indication in records, in bank statements, that would indicate the existence, possible existence of a Swiss bank account.

Q And thus if an auditor walked in on day 1 and said, "I know you are using the XYZ Bank. Show me your records," even if he obtained those records, it wouldn't

necessarily be useful in devising new and different audit techniques?

A That's right.

Q And that was a primary motivation deferring a square question until such time as ordinary auditing techniques had been exhausted.

A Exactly.

Q Now, can you tell his Honor what role --

MR. MAC DONALD: Withdrawn.

Q Did there come a time when the auditors under your direction did ask the taxpayer or his representative alone, if he had a foreign bank account?

A Yes, if after conclusion of his regular examination he found no evidence, he was supposed to ask the taxpayer whether he had any other accounts in foreign countries.

Q And as a matter of our information, did many taxpayers mention that they had such an account?

A Yes. The reason they didn't mention it first is that the account threw off no income, there was no taxable income, and the money in the account had been previously disclosed, and there was no taxes involved.

Q And then did the auditors for that person which disclosed such an account, ask for evidence so that the audit techniques --

MR. MAC DONALD: Withdrawn.

Q In those cases, by definition they had missed evidence of such accounts.

A Yes. Usually there was no such evidence in the books and records as such. In those cases they were normally requested to ask for copies of the bank statements, because foreign bank statements are pretty comprehensive, and we were interested in learning the techniques that foreign banks used, so our agents could benefit by learning to read these statements, which were somewhat different from the usual U. S. bank statements.

Q Did there come a time after that phase when the directions to the auditors were one step further and asked for written confirmation in the form of an affidavit from the taxpayer or his representative?

A If the taxpayer had denied that he had such a bank account, rather than just accept the oral denial, they usually asked for a written statement to the effect, because our experience has been that when somebody has to write about it they sometimes think twice.

Q Did a further percentage of the taxpayers at that point disclosed the existence?

A Yes.

Q And, once again, was the next question asked

about the records, so that the existence of such potential audit evidence could be checked against the program?

A Right.

Q By the way, how many year's experience do you have in the Internal Revenue Service audit procedures and techniques?

A Well, almost all my 30 years were involved with audit, either as a revenue agent, myself as an examiner, I guess about five years as a group supervisor of revenue agents, and four years as a branch chief, which supervises supervisors.

So I was familiar with the operations of examining techniques of the revenue agent, what he is required to do and what he is not supposed to do.

Q Yes, sir. And in the course of that experience, would you tell his Honor whether an auditor or revenue agent would typically request a written statement, be it affidavit or otherwise, from the taxpayer on a subject?

A Usually at the end of the examination, to dot the i's and cross the t's and complete what he had to do.

Q And are examples of such affidavits typical in cases where there is a support, where alimony claims are made by the taxpayer or in estate cases, in compilation-of-debt transfers?

A Yes. It frequently is used in closing the case and being finished with it.

Q Now, I would like to direct your attention to our oral communications with Mr. Boller, who was the intelligence representative in partnership with you, and ask you if in the course of your discussions with Mr. Boller --

MR. MAC DONALD: Withdrawn.

Q Would you tell his Honor the raw number of such taxpayers in the Manhattan district portion of the project?

A There were about 110, give or take one or two.

Q And did the excess over 100 result from the fact that some individuals had been selected by means other than the normal means for this program for audit and were already being audited by the IRS in accordance with its usual procedures?

A Our original target had been 100, but it turned out in selecting these people that a certain number in addition to these 100 we selected -- I don't remember the figures -- ten or 15 were already in what we call the audit stream. They had already been selected for examination based upon whatever class of techniques were being used at that time.

Q Wholly unrelated to the bank account project?

A Yes.

Q And the only reason they were included in the control audit is because additional information came forth?

A That's right.

Q Now, in that top group, will you tell us in raw figures what percentage resulted in a fraud referral report in the Intelligence Division of IRS?

A Of the 110, between 10 and 25 percent.

Q And would you describe briefly the fraud referral process in the ordinary case. What does it involve?

A When a revenue agent uncovers evidence of fraud he's supposed to stop the examination and refer the case to the intelligence Division and there is a formal form that he fills out, very detailed, giving information about the taxpayer and the information that's uncovered which justifies the referral. At that point it is sent to the Intelligence Division after some processing by the Audit Division, to make sure that it's properly made out, that it's a justified referral; and the Intelligence Division can, of course, reject the referral out of hand, but if it accepts it it assigns it to a special agent who contacts the revenue agent and proceeds with the examination.

Normally at that point the revenue agent stops the examination completely.

Q And whatever further work he does is under the immediate supervision of the special agent?

A Yes.

Q Whose case it then is?

A For operating purposes, he works with the special agent.

Q I take it in the ordinary case, the auditors first signs a report, and it goes to his group supervisor, and perhaps his section chief, and then to the ultimate chief auditor in the District before it is passed on to the Intelligence Section.

A That's it generally. The procedures various from district to district, but that's generally the procedure.

Q And in this instance was there a group supervisor immediately directing Agent Laski, who had a title -- perhaps group supervisor or something?

A Yes.

Q And did the fraud referral reports which emanated from this project have to pass through him and through you and through the chief audit prior to being referred for --

A Not through me. Probably the group supervisor and somebody else to the Chief of the Auditing Division before it went to Intelligence.

Q And was there any departure from the procedure you described to his Honor with respect to the referral to the Intelligence Section for potential fraud investigation, further investigation in regard to this project?

A No. The only thing is, we asked the Intelligence Division when they got it not to reject it out of hand, which they sometimes did in a normal case, because to give it a good going over, a good look-see and possibly pursue it.

Q Now, was Mr. Boller, the man whom you dealt as a representative of the Intelligence Division, as a practical matter, first of all, frequently absent because of sickness during the calendar year '68?

A He was out part of the time.

Q And is it your best recollection that the matters that you and he discussed were of a general character and not with respect to the status of information concerning the selected 110 cases?

A Yes.

Q Indeed, are there an additional 50 cases that were under your supervision from the Eastern District during the same period?

A Yes, there were about 50 or 55 in the Brooklyn District.

Q And is it fair to say that Mr. Boller's state of knowledge concerning the 150 cases was --

MR. TIGUE: I object to this. I don't see how he can testify what Mr. Boller's state of knowledge was.

Perhaps Mr. MacDonald was emboldened by my silence with respect to other questions. Mr. Morris can only speak for himself.

THE COURT: Sustained.

Q Would you describe, please, what you witnessed in the way of information flow to Mr. Boller concerning the details of the 150 files that you have been describing; did you ever see, for example, an auditor open the file up to Mr. Boller?

A No. I must say in passing that the selection of these taxpayers for the project originally, Mr. Boller was part of the selection process with me, but these were names as far as he was concerned. He couldn't possibly remember the details of any one return, let alone the hundreds that we looked at.

Q Can you tell his Honor in general what information you observed being brought to Mr. Boller's attention in the course of the program that you have been describing?

A The contact with the Revenue Agent was strictly through me. From time to time, I would discuss the case with him in general, to see if I could get any ideas insofar as what possible techniques to pursue, but these were generalities. Insofar as the actual examination was concerned of the revenue agent as distinguished from the special agent, it was all my responsibility, and without a doubt, Hy Boller had no contact with the revenue agents on the specific cases.

We were quite meticulous about that.

Q With respect to the decision-making process to seek an oral statement from the taxpayer after the audit technique had not uncovered the foreign account and later the written statement, would you tell his Honor what input Mr. Boller had in that decision as you now recall it?

A On an individual case he had no input. The overall problem was discussed. He was part of the discussion, and it was agreed that with the approval of the supervisor a written statement would be obtained.

As we said before, it was primarily a technique because if a taxpayer, anybody, has to put something in writing, when a taxpayer has to sign a statement that he has no Swiss bank account or Panamanian bank account, he's apt to think twice rather than just saying, "No, I don't have any account, never heard of such a thing," and that was the purpose of the statement.

Q In fact, at the end of this proceeding, did you have a hand in authorizing a manual instructing auditors in regard to audit techniques designed to uncover the use of foreign bank accounts?

A Yes, it was used in a part of it, I guess it was an audit manual for in-depth examinations, it was called at the time.

Q And did it report in some regards new techniques

which were evolved in the course of this proceeding?

A Yes. It's hard to tell where a technique comes from, but it resulted from all of the information we had obtained as far as the techniques, information you might obtain in the routine examination of a taxpayer's records.

Q Now, you have some recollection of the Jackson Leonard file as being one of the 100 some odd?

A Yes.

Q And I've also recently refreshed you in some regard with respect to that, have I not?

A Yes.

Q In some of the cases which ended up with both oral and written denials by the taxpayer, in the Southern District, were those taxpayers thereafter questioned, to your knowledge, by representatives of the United States Attorney's Office in the course of endeavoring to discover further information from them?

A Yes.

Q And in the Eastern District was a different technique employed with regard to finding out information concerning the Swiss bank accounts?

A Yes.

Q And was Mr. Tigue coincidentally one of the Assistant U. S. Attorneys who was involved in implementing

that phase of the program?

A He was.

Q He was.

Q Now, was Mr. Leonard's case one of such cases which the U. S. Attorney's Office aided in the investigation?

A No.

Q Of the 35, approximately of the 35 cases or the percentage, I guess it's about the same, in which fraud referral reports were written --

A 25 I said.

Q 25 -- do you happen to know how many of those resulted in an actual recommendation for prosecution and actual prosecution in rough figures?

A Well, I left before it was all over. I do remember one recommendation for criminal prosecution which was dropped by the regional counsel's office for reasons of their own. There were three being worked on at the time when I left and I don't know what happened to them, but only one at the time had had an actual recommendation for criminal prosecution. That's it.

Q With respect to those cases that resulted in the U. S. Attorney's Office's aid being rendered, are you able to tell his Honor if they all fell within that class of

cases in which fraud referral reports were written?

A No, none of them did.

Q Those were cases over and above the basic 25?

A Right.

Q Can you tell us, you have already said Jackson Leonard was not one of those additional cases, is that correct?

A At the time the Leonard case had been referred through the regular routine and it was in the hands of a special agent.

Q And would you describe to his Honor the facts as you recall them of that reference in the Leonard matter and how it was not included in the group?

A Well, there were substantial unexplained income. There was a question of failure to file returns for several taxable entries, I believe they were corporations -- they'd have to be corporations. There was a failure to file employment taxes for a number of businesses. I guess that was it. There might have been others, but I don't remember now.

Q Is there a written record of the fraud referral reports in the case?

A Yes, they are prepared in quintriplicates.

Q And is it a fact that Mr. Leonard's case was not referred to the United States attorney's office for further investigation but was the subject of the fraud referral reports you have described because as far as the Swiss bank aspects of the case were concerned, the affidavit that he gave closed that aspect of the inquiry?

A Yes, right.

Q And whatever further action of the IRS was on the other sources that you described?

A Correct. The Swiss bank account aspect of it was really, you might say, held in abeyance because there were other evidences that conceivably indicated fraud -- let's put it that way -- so that the Swiss bank account was just held in abeyance for the time being.

I wouldn't say that it was closed as such. The case wasn't closed. While the case is still open some information about the Swiss bank might conceivably come up, but since it was undergoing the usual routine, those cases that were in the usual joint investigation status, we did not use -- did not put into the United States attorney's hands, figuring he would get it eventually

when there was a recommendation for criminal prosecution.

MR. MAC DONALD: Your Honor, although your Honor did not actually decide whether the hearing was appropriate with respect to the mail cover allegations that were discussed yesterday, this witness is able to give your Honor an eyewitness account of at least one such session, and we would just ask leave of the Court to pursue that and offer some helpful testimony, we believe.

THE COURT: Go right ahead.

Q Were you an eyewitness on at least one occasion in 1968 to a mail cover operation?

A Yes, I was at the site at the beginning of the whole project.

Q Would you describe to his Honor what you saw with respect to the mail from Switzerland and what was being done with regard to that mail?

A With the approval of the Postal authorities, during the processing of the incoming mail, air mail -- it was exclusively air mail because we reasoned that surface mail would hardly be interesting -- was bagged into the central post office, the GPO on Eighth Avenue and 32nd Street.

The sacks were dumped and we selected -- we

had -- this is a long story; I don't think you are interested, we had devised a means of identifying mails from particular Swiss banks by means of their postage, postal meter numbers, which was unique, and most mail coming in from Swiss banks do not have a return address, no indication as to who sent them. So the mail coming in from Switzerland was sorted. Those with an identifiable sender were sent on. Those with no identifiable sender were photocopied at the rate of, I think, the machine going at 3600 a minute, so that there was -- the time lapse was insignificant. They were sent through, just the front of the envelope was photocopied, and the rest of the mail was sent on.

During all this time the postal authorities always insisted on having at least one of their own employees who work with the postal inspector to make sure that there was no tampering with the mails.

We were very circumspect as far as that is concerned, too, so that not only was there no tampering, we were pretty sure that -- there should have been at least, from our viewpoint, no time lag in mail getting to the eventual recipient.

THE COURT: Mr. Morris, you said 3600. Did you mean an hour?

THE WITNESS: An hour. Did I say a minute? 60 a minute, 3600 an hour. Of course.

THE COURT: One second in other words.

THE WITNESS: Yes. And actually I think we had two photocopiers. The actual mechanics left me after a while. I just don't remember because I wasn't involved with it, other people were.

But if there was going to be a heavy load, and after a while we could spot certain days of the week were very heavy, we had two machines there, so that the actual processing of this stuff didn't take much time.

Q Actually, in 1969 are you informed not by eyewitness account but by somebody working under your supervision that the air mail shipments were received and processed in a matter of an hour or two in the evening prior to the normal sorting beginning in the morning?

A Yes. All of the air mail came in on late afternoon and evening flights. There were only two airlines involved, I guess it was, TWA and Swiss Air, and they were all in the late afternoon and evening flights, most of the stuff came in the latter part of the evening, I would say from 9:00, 10:00 p.m. on, and most of the stuff was done from 9:00, 10:00, 11:00 to 2:00 or 3:00 in the morning and some days of the week, of course,

there is practically nothing.

THE COURT: Do I understand that in the normal course the mail that would come in, air mail from Switzerland, would not be touched for normal sorting until the morning anyway?

THE WITNESS: That's right.

THE COURT: I see.

MR. MAC DONALD: I don't think we have anything further on direct examination.

THE COURT: All right. Well, I take it -- does Mr. Morris have any awareness of any of these specific envelopes that --

MR. MAC DONALD: I haven't shown them to him. I left them in my office. I just assumed that he couldn't recall.

THE COURT: Probably not. I just wondered whether he did.

MR. MAC DONALD: I neglected to show them to him and ask him.

THE COURT: Mr. Morris, what happens afterwards? You then take the photocopies and you go through them and the ones that interest you you take out and the ones you don't, you send through?

THE WITNESS: The mechanics were simple:

This is my recollection now -- I don't mean to tell an untruth; I am remembering; I don't have total recall -- the film was put on a viewer and blown up so that you had a full picture of the envelope and those that were significant for our purpose, a copy was made. Those copies were then -- there would be thousands over a period of time -- were then segregated in some way and shipped up to our data processing center. We had developed a code so that they could be processed.

MR. TIGUE: Your Honor, is this the copies which were taken out?

THE COURT: Yes.

THE WITNESS: Yes. As a result of the processing, we ended up with a printout of the information, which included primarily the recipient's name and address, the date and the code number for the individual bank involved. The word "bank" there is a little loose. Some of it were brokers and some of it were other types of financial institutions, so that even though we restricted ourselves to banks, every once in a while some other type of information would come in, because these others, for some reason, bank secrecy or whatever, frequently did not have any return address on them, and they would end up there, so that they were normally in the nature of some kind of financial institution.

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And from the printout those with increasing frequency, where there are a lot of items, we assumed that something was involved.

Our reasoning had originally been that the good date would be at the beginning ofthe year, January for year ended statements and at the beginning of each month for monthly statements. Swiss banks are very flexible. They will do anything you want as long as you pay for it and those that wanted monthly statements with an active account, that would make sense, so that there we were focusing primarily, although we extended over a period of two or three months -- these were, by the way, limited in time; no case was for a full year -- we tried to focus on those at the early part of the year and early part of the month and when you have situations where somebody has two or three items a month four months in a row, it's a good indication that they are involved in some way. No indication of a Swiss bank necessarily, but there is some involvement with a Swiss bank which was what we were trying to find out.

The actual existence of a Swiss bank was the principle motive, but also we wanted to find out people who may be frighting for the Swiss banks and in some ways steering people to Swiss banks, as there are,

just to find their modus operandi, how they operated.

I think that's it.

Anything else you have?

THE COURT: No. Mr. Tigue, do you want to cross examine?

MR. TIGUE: I do, your Honor. Thank you.

CROSS EXAMINATION

BY MR. TIGUE:

Q Mr. Morris, you and I know each other well?

A Yes.

Q Happy to hear that I didn't have anything to do with the Leonard case.

Just to get a frame of reference here, I have taken a copy from the annual report of the IRS, and it is an organizational chart.

Would you take a look at that and tell me if that is pretty much the way the IRS was set up back in 1968? This is the current year I took it is. I hope it is.

A Yes, I was there then.

MR. TIGUE: I offer that in evidence, your Honor. I have a copy for your Honor.

THE COURT: Any objection?

MR. MAC DONALD: I am still trying to find the

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right box.

No objection.

(Defendant's Exhibit A received in evidence)

Q Now, just to direct the Court's attention, the commissioner, of course, at the top of the vehicle, and then there are regional commissioners, is that correct, Mr. Morris?

A Yes.

Q And you worked in the box which is towards the lower left-hand side called Assistant Regional Commissioners,is that right?

A That's right.

Q And I notice in there there are several sub-headings; one is audit. Would that have been your division?

A Right.

Q And underneath that there is Intelligence. That would be Mr. Boller; is that right?

A Yes.

Q I notice also in the center box at the bottom called District Directors. There is another intelligence section. What relation does that bear to the first box where you and Mr. Boller worked?

A The assistant regional commissioner is responsible for the -- sorry -- the assistant regional commissioner audit would be responsible for the technical aspect of the work of the audit divisions in the various districts within the region and similarly the assistant regional commissioner intelligence would be responsible for the technical aspects more than -- I believe the technical aspects of the district intelligence divisions.

Q And these would be your counterparts. You would be on a higher level, so to speak. The assistant Regional Commissioner's staff and the assistant Regional Director are sort of down in the trenches, as it were?

A Right.

Q There is also an assistant Director of Compliance, and there is an Intelligence and an Audit unit there. Those would be your superior organizations, would they not?

A Correct.

Q Thank you. Now, if I may start with the mail cover, the mail cover was requested by the chief of the Intelligence Division; is that right, sir?

A I believe it was requested by the Regional Commissioner.

Q Let me show you Defendant's Exhibit B.

MR. TIGUE: I will ask your Honor to take judicial notice of Defendant's Exhibit B. I will pass it to the Court in a moment. It is a page from the Internal Revenue Manual -- I have the entire book here, your Honor --

Q (Continuing) Let me show you, Mr. Morris, Defendant's Exhibit C, which is from the Audit Manual as well. I believe it relates also to information from the Post Office, if you look on the right hand side.

A Yes, sir.

Q And I also show you Defendant's Exhibit D. This is also a page from the Special Agents' Manual and relates to how you get information for mail covers. Excuse me, Mr. Morris. If I can give those to the Court --

MR. TIGUE: I will offer them in evidence or at least ask the Court to take judicial notice of them. I have both manuals here.

THE COURT: Is there any objection?

MR. MacDONALD: I wonder -- I have been told that I had to get clearance from somebody from the IRS before they could be made available to me, before they could make available to me the Audit Manuals. I haven't compared these. I note they bear dates after the program, and subject to informing myself as to the relevant pages in whatever prior forms they appeared in, we have no objection.

THE COURT: All right. Your right is reserved to make any appropriate application with regard to them.

MR. TIGUE: I haven't purloined these, your Honor. These are public information as a result of the suit under the Freedom of Information Act.

There are eight of these items now. I don't have the current ones, and I don't believe the old ones were made public.

MR. MacDONALD: C is the Audit Manual, and B and D

are Special Agents' Manuals; is that correct? C is the Audit Manual.

I think I misheard the record. The first exhibit, B, appears to be from the Audit Manual, and Exhibit C is from the Special Agents' Manual.

MR. TIGUE: And D is from the Special Agents' Manual.

MR. MacDONALD: I haven't seen D yet.

MR. TIGUE: Well, subject to checking that, your Honor, I would offer them in evidence.

THE COURT: Yes. They may be received on that basis.

(Defendants' Exhibits B, C and D for identification were received in evidence.)

MR. TIGUE: I think B, your Honor, says that the Audit people cannot get mail covers, and C and D refer to a secret provision which I would ask Mr. MacDonald to secure from the IRS, because if you look at Exhibit C it says, "If you want information from the Post Office, you have to look at Section 370 of IRM 1980."

When I go to my page in the book, it says, "Under no circumstances is this information to be released to the public."

So perhaps it is necessary to take a look at that.

But my understanding, your Honor, is that 370 of that IRM will discuss mail covers and under what circumstances, and I think it is relevant to this present hearing.

THE COURT: Mr. MacDonald, are you being asked to get into something --

MR. MacDONALD: I also think, just from a quick reading of the Special Agents' Manual, this may be some of the results of Mr. Boler's activities, and I want to check and see what was in existence in '68, and that governs, not what was in existence in 1974.

Mr. Morris has already testified he had access to these. I think I heard some testimony about the circumstances under which the Postal authorities admitted personnel to this mail watch, and that is a fact. Whatever the regulation was at the time we are not going to dispute.

BY MR. TIGUE:

Q Can you tell us how this whole mail watch was authorized? Who authorized it to begin with? Do you know, Mr. Morris?

A It was approved by the national office of Internal Revenue, with the Postmaster General, and the actual, the immediate setting up of it was a letter from the Commissioner in the North Atlantic Region addressed to the Chief Postal Inspector in New York, and he had the approval of Washington

to go ahead with it.

Q And that would be the assistant Commissioner for Compliance?

A The assistant Commissioner for Compliance approved it, but the actual letter was signed and prepared by the Regional Commissioner.

Q And would this be after conferring with the Chief of Audit and the Chief of Intelligence in the national office?

A Yes. They are called the Director of Intelligence and the Director of Audit.

Q I beg your pardon.

A Yes. They were in on the discussions.

Q Now, is there a file, or when you were with the Government did you have a file which had all of the various approvals and correspondence between yourself and the national office?

A Yes.

Q And could you tell us where you left that, sir, when you left the Service?

A I was replaced by a fellow named Gerald Appelbaum. My files were kept together. He succeeded me to the job, and he should have had the files. It is now two and a half years ago, and it is conceivable that they have been destroyed, for some reason or other.

But the Regional Analyst Gerald Appelbaum should have thefiles.

MR. TIGUE: Your Honor, the first thing I did this morning when I heard about this hearing is, I issued several subpoenas around this morning, to the Chief of Intelligence, the Regional Commissioner and so forth. Mr. MacDonald tells me he is going to move to quash them. But for the moment I ask that that file, which would show how this whole program got under way and who had a hand in it -- I would certainly request that that can be left until this is settled.

THE COURT: Let me see if I can narrow this down.

Is it your contention that this mail watch that included Mr. Leonard's mail was not authorized?

MR. TIGUE: It is part of what I might call the Secret Special Agent Project, where it is my contention that the law enforcement officer, namely, the Director of Intelligence in Washington, sits down with the Director of Audit, and he sits down with the Postmaster General and what-not, and they agree to obtain the information from this mail watch. That information, which is in part to serve the Intelligence Division's efforts, in addition to what Mr. Morris and Mr. Eberle testified about the audit, it seems to me also had a criminal use.

The best evidence of that is Mr. Leonard, who is

here today, but my contention is that the activity of this group of agents who conducted audits pursuant to this mail watch was in fact the activity of special agents. They might be called revenue agents. They might be getting only revenue agents' salary, but I don't think that controls. The function they were performing, I believe, controls, your Honor.

THE COURT: YOu are getting at the capacity of the people rather than the authority to make the watch. I had the feeling thatyou were getting into --

MR. TIGUE: I am certainly arguing that despite Costello, so many years ago, I think that mail watch is an unconstitutional intrusion on First and Fourth Amendment rights and the right of privacy.

I am certainly reserving that, your Honor, and I wuld hope to get into, in a minute, whether the mail was delayed or whether it was taken out of the Post Office and that sort of thing.

I think Mr. MacDonald is correct in one direction. It was a mail watch. Whether it was conducted properly and, as a result of that, were Mr. Laski and his colleagues in fact acting under the direction of a special agent -- Now, he might have been under the direct line of control of Mr. Morris, but Mr. Boler certainly had a hand in it. I hope to develop what was done and what wâs not done.

THE COURT: I am not sure it is going to end up in any way that will help you, but go ahead.

MR. TIGUE: We are never sure of that, your Honor.

Q Now, Mr. Boler was in Intelligence. Was he a special agent?

A Yes; he was a special agent.

Q And was he a group supervisor?

A He was the equivalent of a regional analyst in the Regional Office.

Q And that would be sort of co-equal with you?

A Yes.

Q Would you and Mr. Boler be equal partners in this joint effort?

A That was the idea.

Q And in outlining the policies and procedures which were to be followed, you and Mr. Boler jointly arrived at a program which was the program, in fact, the FBA project?

A Yes. Overall. I was responsible for the audit part of it, because he was not familiar with audit procedures and techniques and methods, and I was not that familiar with intelligence. So that whereas it was a joint project, we each had our own particular sphere.

Q Was Mr. Tragna one of the agents in the project, also?

A He came on later.

Q I see.

A There was quite a bit of personnel turnover, and he inherited some of the cases near the end.

Q And I notice that there were reports required to be prepared from time to time on the particular cases; is that correct?

A Yes.

Q And at the bottom of the reports, the name is L. Birin. Who was he?

A He was a group supervisor in Manhattan, who was the project leader in the Manhattan District for this particular project.

Q And did he work for the Intelligence Division or the Audit Division?

A He was an audit man.

Q An audit man. Now, you know, do you now, a special agent by the name of James McGowan?

A Yes.

Q Was Mr. McGowan part of this project?

A No.

Q Did he perform any functions in connection with this?

A To the best of my knowledge, no.

Q Now, what happened with the information which was developed in those cases where an affidavit was requested with respect to whether or not you have a foreign bank account or whether you do not?

A Those that were completed except for the foreign banking thing still being in limbo because no evidence had been uncovered and the taxpayer says he did not have a foreign bank account, we selected a group of twenty-odd for referral -- "referral" probably is not the correct technical word -- to the U. S. Attorney's office for a cooperative program we had with them.

Q Now, did you and Mr. Boler prepare reports from time to time to your superiors as to how the project was getting along?

A Yes, sir.

Q And would those be sent not only to the assistant Regional Commissioner but also to Washington?

A Most frequently, yes, sir.

Q And what was the name of the man in Audit and the man in Intelligence in Washington who had responsibility for this project? Whom did you report to in Washington?

A Well, most of it was to the assistant Commissioner of Compliance. I can't think of his name right now. The Director of the Audit Division was and still is Singleton Wolf.

The Director of the Intelligence Division has since left, and I can't think of his name, and I don't know the name of the present man.

We did have liaison with an analyst, the national office analyst in Intelligence and the national office analyst in Audit.

Q Did you and Mr. Boler have joint files, so to speak? You had one joint file cabinet which both of you had access to; right?

A Yes.

Q Now, were the agents who were assigned to the FBA group basically new agents or experienced revenue agents who were assigned to the FBA?

A They were experienced revenue agents.

MR. MacDONALD: I object to the form. We are probing areas beyond the direct examination.

A (Continuing) They were hand picked because of their qualities as good revenue agents.

THE COURT: All right. He has answered. I will let it stand.

Q Now, you say you witnessed one of the watches. When was that? Do you recall, sir?

A The early part of '68. 1968.

Q Can you give us some idea of the dimensions of the

problem? How much mail would come in, for instance, in that one you observed? Would it be one mail bag or would it fill this room?

A No, not fill this room. I would say on an average day there would be eight to ten mail bags, maybe twelve, but at the beginning it was smaller than it turned out to be later. At the time, we were not getting all of the mail we should have been getting. The Post Office was not keeping anything from us. They just didn't realize that there were other planes involved -- other flights involved. Later on, it probably was bigger.

Later on, I did not physically, personally see it, but some place there is some statistics on the volume. I don't remember.

Q Was that in your file?

MR. MacDONALD: I think we can agree, subject to connection if you find out differently, that the letters in this case are in the first three months of 1968.

MR. TIGUE: I don't really know.

THE WITNESS: They are.

MR. MacDONALD: For your Honor's benefit in appraising who flies and who doesn't fly.

Q All of the letters with Mr. Leonard's name on them appeared during the first three months of 1968?

A And during 1969.

Q There were some additional letters from him in 1969; is that right?

A Yes.

Q And have you seen those? Did you see those before you testified here today?

A No.

MR. TIGUE: Might I ask, through the Court, if Mr. MacDonald has those?

MR. MacDONALD: I only have what I had yesterday, and we will take another look.

Q Who would have knowledge about the mail watches in 1969?

A The same.

Q You?

A Yes.

Q Did you have --

A Personal knowledge? I don't, because after this one shot in 1968, this was done by a group of, primarily, special agents.

Q And was there one person who was primarily responsible for that in the Special Intelligence Division?

A Yes.

Q Will you tell us his name?

A I can't think of his name. I'm sorry.

Q It's been quite a little while ago.

A It's been some time. But they would be familiar withthat. Hy Boler, my colleague, would be familiar with the name of the Intelligence man who was responsible.

Q He reported to Mr. Boler; is that right?

A No, not necessarily, because this was a physical process of processing things. I mean, it wasn't that kind of reporting.

Q Was the actual handling of the letters and the photo-copying of them done by special agents?

A Right.

Q And could you tell me -- at least concerning the one that you witnesses -- was the mail --

MR. TIGUE: Let me withdraw that.

Q Where was the mail when you first saw it? In a large sorting area?

A No; they came in in bags, on rollers.

Q And where were they brought to?

A In 1968 they were brought -- probably later, too -- they were grought to the General Post Office on Eighth Avenue, the Central Post Office, Eighth Avenue and 32nd Street.

Q How did you get to see the bags? Were they brought into a separate room?

A They were brought to a separate locked room.

Q In the Post Office Building?

A Right.

Q And in the one that you observed, how many people were working on the sorting and the copying?

A Three -- The inspector was there all the time from the Post Office. He helped a little bit because he was a nice fellow. He didn't have to. He was there primarily to see that nothing went wrong.

There were three special agents involved in this sorting and the filming. Later on, I recollect that in '69 that might have been increased to five, depending on the volume.

Q How long did the process take, at least while you were there?

A A short time. We were not getting much at the time. As I said before, even if there were --

THE COURT: The question was, how long did it take? Half an hour or --

THE WITNESS: A half hour.

Q What about in 1969?

A I would say later on, on heavy days, the prccess could take two or three hours.

Q And where were the letters actually photocopied? In that room?

A In that room. The equipment was there.

Q What was there? A xerox machine, where you just feed the --

A It was a photocopying -- not photocopy. Microfilming.

Q And you just feed the letters into that?

A Yes. Automatic process.

Q Now, before the filming, were any of the letters opened, to your knowledge?

A No. Even when they were opened, the inspector was there to make sure that they were sealed immediately.

Q They would just be accidentally opened?

A Yes.

Q Now of the information was taken out of them?

A No.

Q Was there present any equipment which I have read about in The New York Times, where they can open an invelope and seal it without any evidence of it --

A None whatsoever.

Q Now, I think you said in connection with the selection of taxpayers, the overall decision was made by you and Mr. Boler together; is that right?

A Yes.

Q I know Mr. Boler is retired. Do you know where he

is, sir?

A Yes. He lives out in Bethpage, Long Island.

Q And if we needed him some time, do you know where we could get in touch with him?

A Yes; I believe Mr. MacDonald has his address.

Q And I believe one of the decisions that was arrived at jointly with you and Mr. Boler was that a statement would be obtained from the taxpayer first orally. If a denial, then in writing; is that correct?

A Yes.

Q Now, Mr. MacDonald also asked you if your recollection was refreshed by some documents. Could you tell us in general what you looked at before you came here with respect to refreshing your recollection on Mr. Leonard?

THE WITNESS: Are you going to answer or --

MR. MacDONALD: We have two. There is no problem at all, Mr. Tigue. The third one gives the original information that I mentioned to your Honor yesterday,and we would object to disclosing the identity of the informant, although we concede that the witness can look at it and tell your Honor he looked at it to refresh his recollection.

I don't believe the name of the informant is material to Mr. Tigue's inquiry.

MR. TIGUE: It may be to another line of inquiry if

not to this line.

THE COURT: Let me ask you this:

What is it in your cross-examination that you need this for at all?

MR. TIGUE: Well, Mr. MacDonald stated when he got down to Mr. Leonard, "Had you refreshed your recollection with respect to Mr. Leonard's case?" I would like to know what suddenly refreshed his recollection out of, I guess, tens of thousands of names.

THE COURT: That does not necessarily mean that you are entitled to look at it, even if his recollection is refreshed by it.

MR. TIGUE: Well, if your Honor says I am not entitled to look at it, I suppose your Honor is right.

MR. MacDONALD: Your Honor is right on the law, that counsel is not necessarily entitled to look at a document even though the witness has used it to refresh his recollection. There is a Supreme Court case on that --

MR. TIGUE: May I have a minute to read this, your Honor?

THE COURT: Surely.

MR. TIGUE: I just wondered: I have examined those documents. The third document just relates to the informant and the reward that we heard about yesterday. It does not

relate to the FBA project.

MR. MacDONALD: It does not. It only relates to the record that was described yesterday, thatwas shown to the witness to refresh his recollection concerning the beginnings of the Leonard case and its transfer from a regular audit to his program.

Q Now, out of all these names -- correct me if I am wrong, Mr. Morris -- did you say that there was only one prosecution as a result of this mail cover.

THE COURT: The mail cover? I thought it was the project.

A The project.

THE COURT: The project.

A (Continuing) No. The information in the mail cover might have generated all kinds of things, and we don't know. Insofar as the project is concerned, by the time I left there had been one recommendation for criminal prosecution. There were three or four cases in the mill, and I don't know what happened to them.

Q How many cases were in the FBA project in New York?

A In Manhattan, 109 or 110. In Brooklyn, 55, roughly.

Q And Mr. Leonard was one of those cases in New York; is that right?

A One of the Manhattan -- one of the 110.

Q The one case you said w-s referred: was that Mr. Leonard's case or another case?

A No. A recommendation for criminal prosecution was made after the special agents had it and referred it to the Regional Council for possible criminal prosecution before it comes over to the U. S. Attorney's office. This was merely a fraud referral. It was already under joint investigation.

Q I see. In other words, there was only one fraud referral report prepared for one person in the whole project when you left?

A No. I haven't made myself clear. You asked about criminal prosecution. This is after the joint referral had been made and the joint investigation completed and the special agent has found enough information to warrant a criminal indictment. That is a recommendation of criminal prosecution. The other is just a fraud referral made by the revenue agent. After investigation, it may be accepted.

Q Where was Mr. Leonard's case at the time you left?

A It was under joint investigation.

Q Joint: Intelligence and Audit?

A Special agent and Intelligence.

Q Now, when this program was instituted, was there a coordination with the Department of Justice prior to the institution of the mail watch, do you know?

A No.

Q You mean you don't know or --

A No, there wasn't.

Q Can you tell me or do you have documents which would tell us when Mr. Leonard's tax return was selected for audit as a result of the project or the mail cover?

A Yes. There was a form letter sent over with a date on it that would indicate that the particular taxpayer was selected for the project. A number of them were already in the audit stream that had been selected for some other reason. At that time, I gather, Mr. Leonard was one of those cases.

Q Let me show you Defendant's Exhibit D for identification. Would that be the letter you referred to, sir?

A Yes.

Q Let me ask you this:

Attached to that is a second one. The first is dated June 18, 1968.

A July 18th.

Q Well, never mind. July 18th would be the document which would set in motion the selection of Mr. Leonard's tax return; is that right?

A For the FBA project.

MR. TIGUE: I offer it in evidence.

MR. MacDONALD: No objection.

(Defendant's Exhibit E was received in evidence.)

Q Now, can you tell us what other use was made of the photostats of the envelopes themselves? I mean, you kept all these --

A For the print-out. That was the only use made of the photostats.

Q And who kept the photostats of the envelopes? You and Mr. Boler?

A At the time, they were under lock and key.

Q And those stayed in your files at least until you left the Government service?

A Until I left, yes.

Q Now, the letters which were retrieved or photographed with Mr. Leonard's name on them were in the first few months of 1968?

A The mail watch was only the first few months of 1968 and the first few months of 1969. Just one thing: the '68 was a daily cover, approved, according to my recollection, April 30th or thereabouts of 1968, because the Post Office was very chary and did not want us to be there when their inspector was not available. They wouldn't let us do the work while he was out, and he was out quite a bit, because he had family problems.

So in 1968 it wasn't a solid thing. I think it only

covered about sixty-odd days in a period of four months.

Is that responsive to your question?

(Continued on next page.)

Q That would be for '68?

A '68.

Q In '69, how long is the duration?

A My recollection is four solid months.

Q And when you say "four solid months," that means every day or every business day?

A Every day, January, February, March and April.

Q And the same for 1968, it was less because --

A But it was over the same period of time, but there were fewer days because the inspector was out so much.

Q Now, on direct examination where Mr. MacDonald asked you a number of questions about the purpose or the justification for the mail cover was to attempt to develop audit techniques, is that right?

A Right.

Q That was your job?

A Correct.

Q What was the purpose with respect to Mr. Boller?

A To develop intelligence techniques. They are different.

MR. TIGUE: At the moment, your Honor, I don't have any further questions, but if I might have

just a minute to take a look at my notes?

THE COURT: Yes.

(Pause)

MR. MAC DONALD: I wonder if I might ask for an opportunity, before telling your Honor whether we have any redirect or not, to ask for some help from my witness during the recess.

THE COURT: You may.

BY MR. TIGUE:

Q Just one last question, Mr. Morris. I won't mark this because it has my handwriting all over it, but was there a form used on the F.B.A. project called NAR Form MAN3-926?

A Yes.

Q Were one of those prepared for each of the persons in the project?

A In the Manhattan district, it was prepared each month for each taxpayer in the project.

Q One for each month?

A Each month, each taxpayer.

Q How was that report distributed, sir?

A That was given to the project leader in Manhattan for his information, to see what the developments were, and I looked at them each month.

Q Did you receive a copy?

A No.

Q Did Mr. Boller look at them?

A With rare exception, no.

MR. TIGUE: No further questions, your Honor. Thank you, Mr. Morris.

THE COURT: All right, we will take a recess. Ten minutes.

(Recess)

REDIRECT EXAMINATION

BY MR. MAC DONALD:

MR. MAC DONALD: I offer as the first exhibit for the government, I guess, Government's Exhibit 1 of today's date and Government's Exhibit 2 of today's date, a second document.

(Government's Exhibits 1 and 2 marked for identification)

Q Can you identify Government's Exhibit 1 as the standard form letter which an auditor sends to a taxpayer at the outset of an audit as being such a letter in Mr. Leonard's case?

A Yes.

Q And can you identify from the nomenclature on the top which audit group it was?

A Yes. It says, "In reply referred to" and the symbols used indicates Group 208.

Q Was Mr. Rothstein an agent under the group that you have been describing to his Honor, or was he a normal agent?

A He was a regular agent not involved in the project.

MR. MAC DONALD: We would offer Government's Exhibit 1.

THE COURT: Any objection?

MR. TIGUE: No, your Honor. Let me look at it. It came out of the same book that Mr. MacDonald was not permitted to see from the IRS -- oh, no objection, your Honor.

(Government's Exhibit 1 received in evidence)

MR. MAC DONALD: Government's Exhibit 2 are pages I took out of Mr. Tigue's copy of the manual, and I take it there is no objection, and we will replace the original pages.

MR. TIGUE: There is no objection. It is relevant. I haven't read the pages you are referring to.

THE COURT: It may be received.

(Government's Exhibit 2 received in

jkjw 4a Morris-redirect

evidence)

MR. MAC DONALD: I think those pages are the circumstances under which an auditor should consider giving warnings to a person whose return is under audit.

6pm rd 5

MP Morris - redirect

Q You referred to the fact that the auditors under your direction were selected carefully with regard to their backgrounds and experience.

A Yes, sir.

Q Can you tell his Honor if any of those auditors were members of what was then known as the fraud audit groups which --

A Yes.

Q -- which the District had at that time working under it?

A They were regular revenue agents.

Q And can you describe, please, when the practice of having a fraud group of auditors or revenue agents halted?

A I don't remember the exact time, but it was decided, for many reasons, that separate groups of revenue agents in the fraud group was bad policy, and they abolished it. I don't remember the time, really.

Q Mr. Rothstein was not in the --

A Rothstein was not in any fraud group. He was a revenue agent.

Q I believe one or two questions referred to the time you left the program and the date Mr. Leonard's case commenced. Can you tell us when you left the program?

A I left in June of 1972. My recollection is, June

5th or 6th. At that time, the Leonard case had been referred to Intelligence, and the special agent was working with the revenue agent on it.

Q It was a written fraud report?

A A regular written fraud report.

Q You referred to some file cabinet or cabinets that you used in carrying out your activities that were available to your counterpart from Intelligence with equal access.

A Yes.

Q Will you tell his Honor where physically those were located?

A They were at 90 Church Street, the office of the Regional Commissioner.

Q And did they contain, among other items of information, the basic computer print-out with the names as well as the photostats made from the microfilming of the envelopes?

A Yes.

Q And where were the auditor's work papers filed and maintained during the course of this project?

A They were maintained at the District Office at 120 Church Street.

MR. MacDONALD: I have nothing further, your Honor.

THE COURT: All right. Any further questions on recross, Mr. Tigue?

RECROSS-EXAMINATION

BY MR. TIGUE:

Q I notice, Mr. Boler -- Pardon me. I have a bad habit -- I notice the second page in this July 18th document reads, just briefly:

"Examining officers will not advise the taxpayer that the Service has information concerning his utilization of a foreign bank account. If the examination does not disclose evidence of such involvement, careful questioning will be required to elicit the necessary information or explanation."

So I take it that instructions were given to the revenue agents in this project not to tell the taxpayer about the information you have?

A At the beginning, yes.

Q And the revenue agents were not instructed to give the taxpayer what we have come to know as the Miranda warning?

A No.

Q They were not; is that correct?

A Right.

Q Just one other question, relating to one of the documents you looked at.

Information items which are sent to the Internal Revenue Service are referred to the Intelligence Division, are

they not?

A At first, yes.

Q And then, after the special agents look at them, they sometimes give them to the revenue officers to investigate; is that right?

A The revenue agent. Yes. The revenue officer is another person entirely.

Q The revenue agent. I beg your pardon.

A Yes. A certain portion are sent to Intelligence, and if they can't handle them, because of limited manpower, they send it to the Auditing Division, which screens it out for productivity and sends it to --

Q They keep some themselves and give others to Audit; is that right?

A Yes.

Q And was that done in the Leonard case with respect to the information item?

A I presume so.

Q You don't know?

A No.

Q Do you know who would know about that, sir?

A They have changed titles. The best person to find that out from would be the chief of the Audit Division in the Manhattan District. They have a file on informants' communi-

cations and indicate what happens to each communication. It is a very controlled thing. And that would show at what time this particular communication was assigned.

Q Now, Mr. MacDonald mentioned Mr. Rothstein. Mr. Rothstein did not perform the audit in this case?

A As far as I know, he did not.

MR. TIGUE: No further questions.

REDIRECT EXAMINATION

BY MR. MacDONALD:

Q A new question on redirect:

This percentage of information items which are referred from Intelligence to Audit, which go beyond that initial reference and get thorugh the screening: in 1968 they were referred, were they not, to the fraud groups of auditors that you referred to earlier?

A I would say yes if it -- if I know when the fraud groups were abolished, but I don't remember. It might have conceivably been before '68, but my recollection is that they still were in existence, and those would have gone to the fraud groups. If it was abolished before, because of my faulty recollection, they were distributed throughout the office.

Q Looking at Document 00025, the document you used to refresh your recollection, does that give an indication of who the individual was whom Mr. Tigue was asking about, who

MP 6 Morris - redirect/recross

received in the audit group the information that had come in?

A Well, no. You see, this is merely an Intelligence form, and this merely says that it was sent to the Audit Division April 16, 1968.

Q And there is no indication of who there received it?

A There is no indication of the screening committee. I am fairly certain they were still using a screening committee of three to select these for possible audit. There is no indication on here. This is an Intelligence form and merely discloses intelligence information.

The Audit Division does have the information as to who selected it and at what time.

MR. MacDONALD: We have no further questions.

RECROSS-EXAMINATION

BY MR. TIGUE:

Q This fraud group: these information items are sent over to a group, an audit fraud group?

A No. They are first sent over to a screening committee in Audit, and they select it. It was at one time that they had separate audit fraud groups, and it was given to the audit fraud groups to the limit of their examining capacity. Any excess went to regular groups. When the abolished the audit fraud groups, they were parceled around among regular income tax groups.

MP 7 Morris - recross

Q And do you know if this information in the Leonard case was sent to one of those audit fraud groups?

A I have to understand that it was not, because Rothstein was not a member of the audit fraud group and never was.

MR. TIGUE: I have nothing further.

MR. MacDONALD: No questions.

(Witness excused.)

THE COURT: I take it that completes your testimony.

MR. MacDONALD: I believe so.

MR. TIGUE: I don't agree, your Honor.

MR. MacDONALD: At least it completes the presentation of the Government?

MR. TIGUE: If the Government would stipulate that when Mr. Laski went to Mr. Leonard's office, they never gave him any kind of constitutional warnings, that would be correct. Otherwise, I would have to establish that through Mr. Laski, who was present.

MR. MacDONALD: We have already submitted to the Court a sworn deposition that sets forth the circumstances. We stipulate that there were no Miranda warnings. I gave Mr. Tigue, also, an affidavit --

THE COURT: You have in mind more testimony for Friday morning; is that right? Or this is it?

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MR. MacDONALD: Judge, we would stand on Mr. Laski's deposition. Mr. Tigue cross-examined him quite thoroughly. If there are any further questions of him, we can take them at this time and not have him come again.

MR. TIGUE: I was going to question him, and now it turns out, apparently, the whole story is in with respect to the whole mail watch and what group was involved, so I don't know that his testimony is necessary. But, frankly, I had served these subpoenas, which called for a great many records, which are returnable friday, and they relate to the very foundation of this program and the involvement of the Intelligence Division.

THE COURT: Mr. Tigue, let me get you on record here, because we are holding a hearing on what I would regard as the most informal of bases, and I think it would be appropriate at this point to see what the basis is that you contend for, I take it, the exclusion of the material picked up in the mail watch, and I gather the statement of Mr. Leonard that was taken -- I don't have the date.

MR. TIGUE: The oral statement on March 17th or 18th of 1969. The statement was made --

THE COURT: A written statement?

MR. TIGUE: There was a written statement in August of 1969, an affidavit.

MP 9

THE COURT: Now, it is those two things that you are attacking. You are attacking those?

MR. TIGUE: Yes, your Honor. Certainly, to start with, those. But I think from what I have learned this afternoon -- and I think the record establishes it -- I was astounded by some of the testimony, although it was a quiet hearing. It seems to me the conduct of the Government in this case was that the Intelligence Division, the law enforcement branch, got approval from the Post Office, and I don't know if it complies with their regulations -- we have to research that -- in the Post Office to permit the IRS special agents to come in, take the mail out of its ordinary course, bring it into a separate room, photograph it and return it on its way.

I think that is probably a violation of Title 18, Section 1702, which regulates the looking at mail for the purpose of discovering a person's business or his secrets. I think the whole mail watch and anything that flowed from that are suppressible.

THE COURT: Let me ask you this: is that factually the highwater mark? You just say they didn't have a right to do it?

MR. TIGUE: I think constitutionally, legally, they didn't have a right to do it. Of course, their superiors told

MP 10

them to do it.

THE COURT: What did you do with the Sclafani case and the Squieri case?

MR. TIGUE: Mr. MacDonald gave them to you --

THE COURT: I am sorry. The cases that are cited in the Isaacs case, where Courts of Appeal of all kinds say there was no substantial delay involved in the delivery of the mail -- here apparently there was zero delay in the delivery of the mail.

MR. TIGUE: In all those cases there was a simple mail cover, as to one person. Here there was a massive one. My guess is that --

THE COURT: This isn't a class action. You are representing Jackson Leonard. The question is --

MR. TIGUE: I would submit, your Honor, that the old Costello case in this Circuit, some fifteen years old, does not control the facts of this case. I believe in the Koerner case it was conducted by Postal authorities and what-not, and the regulations have changed over the years.

In Costello's time they had one regulation, and now Mr. MacDonald tells me the regulation is abolished, and, frankly, I haven't looked at this yet.

I have trouble with the Costello case. I don't deny that for a moment. It says mail watches per se apparently are

MP 11

okay, and they look to the delay because the grounds in that case were in part the 1703 delay in delivery of mail. But at least in part I've got a pretty good argument under 1702, where the Post Office matter is taken out of an authorized depositary into a separate room, and the prohibition is against prying into the business or secrets of another.

THE COURT: Let me stop you there. Are you going to offer any proof on this mail cover issue? Are you going to offer any proof of your own?

MR. TIGUE: I hope when I receive the records which I have subpoenaed -- I am convinced that when those records are supplied -- and I have subpoenaed the chief of the Intelligence Division in New York, the Regional Council in New York, the District Director and subpoenaed the Department of Justice in Washington, whatever records the State Department may have had in connection with this, and I am convinced if those records are produced, your Honor, you are going to find that there is a violation -- I shouldn't say I am convinced, but I think I have a right to develop at this hearing, which was given in other cases, to develop the facts of just what happened --

THE COURT: No. YOu see, the problem is, you are getting the cart before the horse here. You are putting the Government to defend something where there has been no

MP 12

showing that there has been a substantial delay in delivery.

MR. TIGUE: That's true, your Honor.

THE COURT: Do you intend to make any showing that there has been a delay in delivery of this man's mail?

MR. TIGUE: I don't think I could tie it precisely to those periods, your Honor.

THE COURT: It seems to me if you aren't prepared to raise that issue of fact, then certainly on the testimony of Mr. Morris it would appear that there was absolutely no interference with the flow of the mail at all, because, according to his testimony, that mail wasn't going to be sorted until the next morning, anyway. So it was sitting there that night, and either it sat in the bag or it went thorugh the microfilming process.

MR. TIGUE: I believe that gets the Government past 1703 but not 1702, your Honor. 1702 relates to removing mail from a depository or prying into the business or secrets of another.

I contend, your Honor, that is precisely what the Internal Revenue Service did in this case. It removed the mail -- Well, I will let your Honor read it.

THE COURT: I don't see that as applying here.

Mr. MacDonald, I don't see 1702 applying here at all.

MR. MacDONALD: My recollection is that the Court of

MP12(a)

Appeals in Costello considered the applicability of 1702 to the agents there who intended to pry into Mr. Costello's secrets so they could find out all the people he did business with and build a tax case, and they held that the mere intention of reading other persons' mail in Costello was not the kind of violation which gives rise to suppression, and I think this is equally applicable on that statute as well.

I think they argued all statutes, 1701, 1702 and 1703 in Costello.

6pm

MR. TIGUE: That's true, your Honor, and they really basically discussed the delay aspect of it, but I by Mr. Morris' own testimony the secret they were attempting to discover was if and where Mr. Leonard had a Swiss bank account.

THE COURT: Well, I would be prepared to rule that 1702 does not apply to this situation or on the facts before us, 1703.

Now, you have a subpoena out -- as I say, I don't see that you have got a case where you made really enough showing to put the government to a defense, but they started to defend, and it seemed to me --

MR. TIGUE: I think the subpoena, your Honor, would be the documents called for, and the subpoena would be admissible on the secret agent issue if not on the mail coverage.

THE COURT: All right, if you feel that that is the issue then, on which the subpoenas are addressed, let's defer that.

MR. TIGUE: I sort of, if your Honor has just ruled against me --

THE COURT: No, I don't want to cut you off because I don't want to be in a position of ruling where you say you can supboena things that will prove your right

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to suppress the mail cover, but what is it that you would expect from here with regard to the mail cover?

MR. TIGUE: With respect t the mail cover, these would be Costello --

THE COURT: No, these would be Jackson Leonard.

MR. TIGUE: When I say these would be Costello, your Honor, Costello seems to say that mail covers are not per se forbidden and if there is no delay it is okay, and your Honor has found that those are essentially the facts, and I would say that those documents would not be relevant on that issue.

THE COURT: On that issue. All right. Well, then, let's go on, and I will deny your motion to suppress the fruits of the mail cover.

Now, let's go on to the secret agent which is the next thing. What is it that you contend there?

MR. TIGUE: What I contend there, your Honor is that through the conduct of -- first of all, it is a complicated issue with respect to the warnings which I will get to in a minute, but I think their earlier cases of Lipschutz and the other case which your Honor was involved in, involved a situation where the special agent had himself a Trojan horse and he sent him to the taxpayer.

I think that is precisely what happened here. The fact that he was under the operational control of Mr. Morris does not help the government because Mr. Morris was only half of the body which was directing him. The other half was Mr. Boller, who is an experienced senior intelligence official. Mr. Morris testified that the decision for this project and the mail cover was made --

THE COURT: Let me take you to the black letter law for a minute. Is it your contention that just because there was an inquiry going on that happened to involve special agents that no statement could be taken from Mr. Leonard without the giving of Miranda warnings?

MR. TIGUE: That states it a little differently than I would state it, your Honor.

My position basically is that when Mr. Laski walked into the office of Lescowitz or Leonard, he had an obligation to give a Miranda warning.

THE COURT: On what theory?

MR. TIGUE: On the theory that he is a law enforcement official who was investigating possible fraud situation. On two grounds; one, he was apparently looking into the existence of alleged kickbacks which were received by Mr. Leonard, which is absolutely untrue, and I believe the trial will show that 100 percent.

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The second one, that he was looking into was is whether or not he had a foreign bank account and whether or not it had been reported in his tax returns.

I think that that is essentially a criminal investigation, your Honor.

At that point in time, there was almost concurrently with that, it can be November 1968, the Internal Revenue Service issued a press release which said that whenever criminal investigation begins it is our policy to give all taxpayers the following warning, which is essentially a Miranda warning.

It seems to me that when he walked in there, while he might have been working directly under the direct supervision of Mr. Morris, he was also working under the direction of Mr. Boller. They both arrived at the decision jointly that the evidence that they had of the existence of a Swiss bank account was to be withheld. He was directed not to give any warnings. And then he finally was authorized to ask Mr. Leonard the question "Did you have an account?"

He had to go back and get some additional authority to obtain a written affidavit, and that document was ultimately used in connection with the prosecution of Mr. Leonard when they finally got around to the niceties

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of writing up a fraud referral report.

My contention, your Honor, is that the statements that were given by Mr. Leonard should be suppressed because they were on a criminal investigation and all of the evidence which flows from there.

In this case I would submit, your Honor, that is everything.

THE COURT: I see. Well now, how do you feel with Sclafani and Squeri, 265 Fed. 2nd 408 and 398 Fed. 2nd 785, with which I am sure you are familiar?

MR. TIGUE: Those are the earlier Second Circuit cases.

THE COURT: Squeri is 1968, in which Judge Lumbard says that Miranda only applies when the inquiry -- when it is a question of custodial interrogation, and citing Sclafani, which is to the effect or saying, page 788, the information, presumably conveyed to the taxpayer that his returns are under audit is sufficient notice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action when they speak to him, and then at one point later on he quotes some other circuit case which says, to some extent, persons must be prepared to look after themselves.

MR. TIGUE: I am familiar with those cases,

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your Honor, I am prepared to deal with them.

Now, the indication which I was involved, United States versus Riland, this very issue was briefed in great detail, and late last night I got these briefs out and I xeroxed them, and I have a copy for the Court or the Court's clerk, and they are really kind of bulky at the moment but by and large what has happened, how I deal with those cases, your Honor, they are both prior to the news release issued by the Internal Revenue Service in November 1968.

Now, there are definitely two lines of authority. The old line, all predated that 1968 news release. There are three circuits since then. I think it is the first, fourth and seventh. I am not sure. But it is all written down here, which says that if the soverign is going to impose upon itself a regulation and restriction, that they have to very scrupulously adhere to it and when the government doesn't adhere to it, they have suppressed the statements and all of the evidence which is obtained therefrom.

Since that date, since that press release has come down, and it is on a due process grounds, it is really a little different from Miranda, it is a matter of due process, where the government can't say, "I am going to give Tigue warnings but I am not going to give Leonard

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warnings." They have to uniformly adhere to what their policy is, and I think that when the Second Circuit gets an opportunity to rule on this very issue post 1968, as I hope they never do in this case, I think that they will join the majority of the circuits who have ruled that when the government does not comply with its own press release, which is issued to the public and, as they state themselves, for the purpose of looking out for the Constitutional rights of the taxpayers, that they are held to the mark, and if they don't comply with that, evidence they obtain therefrom will be suppressed.

THE COURT: I see. Mr. MacDonald, let me hear you on this point. I want to consider these briefs. Did Judge Stewart rule?

MR. TIGUE: I will hand them to your clerk. He did rule on it after a very extensive, confused factual hearing, where many, many agents testified and there was a great amount of testimony in conflict, and in that case the agents did give the warnings, the special agents gave the warnings, and there was a factual issue as to whether or not they did and the Court --

THE COURT: He found they did?

MR. TIGUE: Right. So it was moot.

THE COURT: That's the end of that. All right.

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MR. MAC DONALD: I have copies of the other circuit decisions which have considered the press release theory and have rejected it as setting forth any constitutional bottom line and have also rejected it as setting forth the test by which auditor interviews ought to be conducted. Those are the Tenth, Ninth and some others, and I will pass these to your law clerks.

THE COURT: The Second Circuit hasn't reached it?

MR. MAC DONALD: No, sir. Actually, this case differs from that press release case because of Government's Exhibit 2 of today's hearing, the actual regulation which is before the Court, that governs auditors interviews with taxpayers, and it essentially says when you are just talking to the taxpayer while conducting an audit, you should conduct yourself intelligently and not mislead the taxpayer, and it sets forth some suggestions on how to be a proper government representative.

It says when you summon a man and you bring him in for testimony under your subpoena power, you are not obligated to give the Miranda warnings, but maybe, if you have a sufficient suspicion of criminality, you should consult with the regional counsel and decide the question on a case by case basis.

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That is surely a more sound basis for testing the conduct of auditors in New York than a press release that no doubt tracked the language of the special agents manual, although we can't tell from the face of the Fourth Circuit's decision, and the special agents have a manual, and if they violate their manual, I think the government will concede, a proper remedy in the circumstances of a given case would be to suppress a statement obtained in such fashion.

I think here the testimony factually establishes that Agent Laski was obviously a selected auditor, but nevertheless an auditor, and he was not a stalking horse for the man who probably he never met up in the heirarchy, and that he was doing an auditor's job in compliance with the auditors manual which told him to exercise care and restraint. He had some special instructions. They were in written form. Your Honor has the writing. We don't believe that this record establishes that Mr. Leonard, who is represented -- I think Agent Laski's deposition, which your Honor has, indicates that he was represented by an accountant at the interview, not a lawyer. That deposition may also indicate that when Rothstein, the concedely normal auditor wrote the letter -- I am not sure of this but I think the facts are, in any event, that

jkjw 10

a lawyer was the original person contacted by the IRS, Jacob Lefkowitz; it was determined by Mr. Leonard that Lescowitz, his accountant, would deal with the auditor in this case, and we submit there is no violation of a regulation, there is no violation of a press release, that the more persuasive authorities are those that we submitted to the Court, and that there is no occasion for any further hearing, nor is there any occasion for plumbing the depths of the government's files any further than we have already gone.

THE COURT: Mr. Tigue, is it understood by you as a fact that the first contact was with Mr. Leonard's attorney Lefkowitz?

MR. TIGUE: The activity report of Mr. Laski indicates that, but then Mr. Laski testified that Lefkowitz said, "I'm not his attorney in this matter, so go find the taxpayer yourself," and he got a Mr. Lescowitz who was an accountant, so there is no situation where an attorney was actually present here, your Honor, and I would additionally submit that the Lipschutz & Wolridge case are separate from the lack of warnings case. I think there is a valid distinction between compliance with the press release on one hand and on the other hand the government using stealth and trickery to put in a person who is

kjw 11

really not in the capacity he is alleged to be.

Mr. Laski walked in and said, "This is a normal audit," when in fact it was a criminal investigation.

So I think it is twofold. One, it is a situation where the government does put in a Trojan horse and, two, it is the lack of warning.

THE COURT: Well, what is your position with regard to what Mr. Leonard understood the investigation to be at the time he gave the statements?

MR. TIGUE: If he gave the statements that, that it was a normal everyday audit that was being conducted of his income tax returns, which was not the case at all. He is a special Revenue agent who is part of a separate group, not really interested in the audit; what they are really interested in is establishing whether the guy has a Swiss bank account and what to do about it, and they get him to say something under oath, and holding back information -- I mean, that's what a special agent does; it's not what a Revenue agent does. He comes in and attempts to determine what the correct tax audit is.

Mr. Laski did precisely what his job was. He came in as a Trojan horse. He gathered together a bunch of information and he participated in the referral to the special agents for prosecution, and I think that

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should be condemned under the circumstances, where the information is obtained from a mail watch, a special group is set up, in which the intelligence person has an equal say in what happens, and I asked Mr. Morris specifically, "Did you and Mr. Boller jointly arrive at a decision that this information would not be given to the taxpayer and no warnings would be given to him?"

And I believe he answered, "Yes, that is correct."

THE COURT: Doesn't a lot hang on what they know at the time and at that time they don't necessarily know. This is an investigation of technique to find out --

MR. TIGUE: That is true. I believe in every special agent's investigation, your Honor; he walks in, he really doesn't know. He has got some indications that there is possible fraud and checks them out. But the whole purpose of this was really to deny Mr. Leonard the right to counsel and the right not to say anything, because I think, your Honor, before you assumed th e bench you were very experienced and distinguished defense counsel and you know that when a Revenue agent walks in, everybody says, Give him the books and see how much I owe in addition, and get him out of here.

When a special agent comes in and slaps the

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the badge and gives you the warnings, it's an entirely different situation. That is what he was denied here. He was denied the right to say, "I don't want to talk to you. I want to talk to my lawyer before I do." That is a right which he exercised later on when he found out that he really was under an audit by a special agent.

THE COURT: Let me deal with your subpoena now. What was it that you expected the subpoena to show, just that --

MR. TIGUE: Well, the subpoena, one of the paragraphs in there may be familiar because it is taken from the Kerner case. I beleive it would show some of the things which Mr. Morris already has testified to, but the whole program from the mail cover down to the F.B.A. project and the involvement by the intelligence people in the whole project I think would establish that there was a program which was established in Washington for the purpose of, one, discouraging these Swiss banks; two, prosecuting people who did use them and use them illegally, and three, sort of coincidentally -- maybe not coincidentally -- that understates it -- but, three, to find out some additional audit techniques which was what Mr. Morris was about here, and I think that if any of those purposes is wrong, especially the intelligence involve-

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ment in it, I don't believe that the government should profit from that. If they were really just out for audit techniques, Hy Boller would never have been on this project. They were out looking to prosecute people who were using Swiss banks and that's precisely what they have done here. I think the documents, in general, were examined, --

THE COURT: Using Swiss banks to conceal --

MR. TIGUE: I said illegally, before.

THE COURT: Illegally.

MR. TIGUE: Yes, and that is what Mr. Boller was there for, that if this little project comes up with somebody horsing around with a Swiss bank account, they're darn well going to be prosecuted, and Mr. Leonard was.

I just think that the government has slipped here because they shouldn't have gone about it the way they did. They should not have had an intelligence person who had a hand in this project. If they wanted to just conduct a regular audit and determine audit techniques and keep their information to themselves, fine, but what they did here is essentially what happened in Wolride and Lipschutz, they got a special agent, either through or with the assistance of Mr. Morris, to go in, obtain information, and turn it over to the special agents with the resulting prosecution.

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THE COURT: Let me ask you: Is it your contention that anyone said to Mr. Leonard that in the information they got against him would never be used criminally but would only be used civilly?

MR. TIGUE: No, there is no contention that anyone said that, your Honor.

THE COURT: Because isn't that really what Wolridge said, that there was a fraud committed on him and that -- you see, is it Squeri indicates that it really doesn't make any difference what the purpose of the inquiry was; the taxpayer is on notice by just the fact of the inquiry that there is a criminal risk, even if it is only a Revenue agent.

MR. TIGUE: But the risk here was extraordinary, your Honor. No one said to Mr. Leonard, "Listen, don't worry, this audit is only for civil purposes."

No one exclusively said that, but the implication was -- Mr. Leonard had been audited for twenty years straight by Revenue agents, and here is just another Revenue agent in the long line of these people, so the implication --

THE COURT: I know what we are dealing with, even though that may be, what we are dealing with is whether or not something Mr. Leonard has said may be used

jkjw 16

against him in a prosecution. It is the bottom line.

MR. TIGUE: Yes, your Honor.

THE COURT: Normally it may be, if he talks to somebody and if he were to talk to a non-government agent about this at a cocktail party, it could be used against him, so there has got to be some reason why it can't be used against him. We have really got to come down to that.

MR. TIGUE: The two reasons are, one, he should have gotten the warnings and, two, there was a fraud perpetrated on him.

THE COURT: Well, Squeri indicates he doesn't have to have the warnings. Wolridge says that you can't defraud the statement out of him.

MR. TIGUE: And they both here. They didn't give him the warnings, your Honor, because that predates the news release, which I submit when your Honor reads --

THE COURT: I appreciate that link with the argument.

MR. TIGUE: The second one is that you can't sneak the admission out of him. Gee, my goodness, this is exactly what happened here. Laski came in, he posed as a Revenue agent for a while and then he comes in, he says, "Okay, I have looked around. I haven't found anything

on a Swiss bank account. Now, Mr. Leonard, tell me, do you have a Swiss bank account or not?"

At that point, your Honor, he is on a mission for the intelligence division. He is not developing any audit techniques or anything else. At that point he is Mr. Boller's alterego and Mr. Leonard says, "No."

Mr. Laski goes back to the superiors and says, "What do I do. He denied it."

And they apparently have copies of envelopes where he has received correspondence from what appears to be a Swiss bank because of the meter number, and they say, "No, no, go back and get an affidavit from him."

MP

Now, that to me, whether Mr. Morris says it or whether Mr. Boler says it, doesn't make any difference, because they have agreed on how they are going to handle these cases, and it seems to me he is operating as much at the direction of Boler as of Morris. He is, in fact, having a statement squeezed out of him, improperly.

THE COURT: I think there is really nothing in this subpoena which would add to what you have brought up today.

MR. TIGUE: I don't know, your Honor.

THE COURT: You are not prepared to tell me what you will get, to the extent that will require an extensive shaking of the bush of the entire Internal Revenue Service from here to Washington.

It seems to me that until you tell me what you expect to get --

MR. TIGUE: Well, I expect to get the direction from on high that this was how the project was to be continued here, and "on high" consists of the director for the Intelligence Division for the entire IRS for the United States and that he had a hand in that --

THE COURT: That is one thing. What else?

MR. TIGUE: That's essentially it, your Honor. I have attempted to prove to the Court on that subpoena that this was an intelligence operation, that the special agents

MP 2

had a hand in it and that they directed it, and that is essentially what the subpoena goes to, and the reason --

THE COURT: Let me see if I have phrased it for you fairly. What you want from the subpoena is to prove that there was a direction from the top that there was to be a prosecution of those using illegal Swiss bank accounts, to get rid of that kind of situation.

MR. TIGUE: And anything else concerning the Intelligence involvement in that decision.

I am sure once upon a time the Commissioner of the Intelligence Division sat down with the Chief of Audit and said, "What are we going to do about these accounts?" And they said, "Let's set up the FBA.'

THE COURT: I will reserve on the subpoena and that statement.

MR. TIGUE: I would like to update the Riland brief, if there is any case on that, and Mr. MacDonald has given me some cases which I haven't read yet.

THE COURT: All right.

Now, let me make a few announcements of where the Court is at with regard to various matters.

With regard to your motion concerning the "similar acts", I do not see that this is within the Baum opinion, and my ruling is that I am not going to direct that the Government

advise you of any witnesses to that effect or give you a bill of particulars. I do, however, suggest that the Government, having the Baum case in mind, has to make its own determination as to whether proof of these similar acts would come in so far from left field that you are prejudiced by its being offered in line with the Baum case, because if it is too far from left field I think I would have the duty to exclude it or, in the alternative, if it were admitted, not to consider it.

So, Mr. MacDonald, I suggest this: if this is an area where it does no harm to your case, you may want to advise generally what the similar acts are that you intend to prove. I am not aware of what they are, and so I am going to leave that to your good judgment, and I will decline to order any relief to the defendant based upon that application at this point.

MR. MacDONALD: I just might say, your Honor, that I think as far as the Government's case in chief is concerned, Mr. Tigue is well informed concerning our outermost peripheries. In the Baum case there may well be some left-field matters to go into on rebuttal.

As I think about it, our obligation in this case is to show Mr. Tigue every exhibit in our case in chief, and he will see every exhibit in our case in chief, and he cannot

MP 4

be surprised in that respect.

THE COURT: All right.

I ruled yesterday on the U.C.C., the Union Carbide contract. I am reserving decision on the question of those statements.

I ruled yesterday on the deposition on the cover matter.

With regard to the dismissal of Counts 1 and 2 of the indictment, Mr. MacDonald -- you were going to move to dismiss Count 3 because of an error in date. Is there any reason why you can't do that now?

MR. MacDONALD: I so move, your Honor.

THE COURT: It is granted, I assume with the consent of the defendant.

MR. TIGUE: Yes, your Honor.

THE COURT: I deny, however, the motion to dismiss Counts 1 and 2. I do not see that this is anywhere near the authority which was cited to me, the name of which escapes me at the moment, involving perjured testimony. I do not see from the minutes of the grand jury that there is any impairment of Counts 1 and 2 by reason of this error, so I decline to dismiss them on those grounds.

Now, finally, in the absence of something very unusual, we shall start the trial on Monday morning.

MP 5

Is there anything else?

MR. TIGUE: One matter I would like to bring up.

I did receive a report on the copy of the chemical test. It only says that a chemical and physical examination has been made, and I refer specifically to this neutron activation test, which is highly complicated. I don't know what they did.

I would like a direction from the Court that Mr. MacDonald be a little more informative. The man gets on the stand and says, "I have performed a neutron activation test." They refer to the ink libraries that they have. I am not exaggerating, your Honor.

MR. MacDONALD: It was not a neutron activation test. It was something far simpler. It involved analyzing the components of the ink --

THE COURT: I am sure we will be listening to a very effective cross-examination on the process.

If Mr. MacDonald wants to advise you what the process is, he is at liberty, in his judgment, to do so.

MR. MacDONALD: Judge, I know that Mr. Tigue had requested five additional challenges. Have you come to any decision --

THE COURT: Yes. I am going to deny that.

Anything else? Monday morning at ten o'clock.

(Ajourned to January 13, 1975.)

WITNESS INDEX

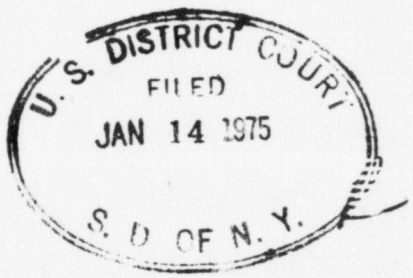
Name	Direct	Cross	Redirect	Recross
Bernard H. Morris	47	73	100 106	104 107

EXHIBIT INDEX

Defendant	Identification	In Evidence
A		74
B		78
C		78
D		78
Government		
1	100	101
2	100	101

Letters Rogatory.

JSR:dm



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

- v - : 74 Cr. 599 (RO)

JACKSON D. LEONARD, :

Defendant. :

- x

TO: THE APPROPRIATE JUDICIAL AUTHORITY IN LONDON, ENGLAND:

The United States District Court for the Southern District of New York presents its compliments to the appropriate judicial authority in London, England, and requests its assistance in the following manner.

1. Jackson D. Leonard is presently on trial before this Court and a jury pursuant to a ~~three~~ Two-count criminal indictment filed against him on June 13, 1974 by a federal Grand Jury sitting in the Southern District of New York. The charges he faces all arise from the making of allegedly false and perjurious statements, in violation of United States criminal laws.

2. Specifically, he is charged, in two counts, with violation of Section 7206(1) of Title 26 of the United States

MICROFILM
JAN 14 1975

Code, which provides, in pertinent part, that:

> "Any person who ... wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

~~Further, he is charged, in a third count, with violation~~ of Section 1001 of Title 18 of the United States Code, which provides, in pertinent part, that:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully ... makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than ~~five years, or both~~."

Delivered
Ronald Owen
U.S.D.J.

3. As the result of the testimony and documents before me in this case and the representations made by the United States Government, I have determined that one EVA BROOKE, whom the United States seeks to call as a witness in this case, is likely to be able to provide the Court and jury with testimony having a material bearing on the instant case.

Specifically, I am informed by the United States that the defendant Leonard made materially incriminating statements to Ms. Brooke and that Ms. Brooke has previously admitted as much in conversations with representatives of the United States.

4. Further, I am informed by the United States that Ms. Brooke is a British citizen, but that she has resided in the United States for most of the past two or three years and has a house in Oklahoma. However, I am informed that, even though she was previously served with a subpoena requiring her attendance as a witness before this Court in this present criminal case, she is presently residing in London at an address now known to the United States Government and has resisted coming to New York in compliance with the subpoena, even though the United States has agreed to bear all her reasonable travel expenses.

5. Accordingly, it is hereby requested, if appropriate pursuant to the Foreign Tribunals Evidence Act of 1856 as construed in terms of the Extradition Act of 1870, or pursuant to other pertinent laws of the United Kingdom, that the appropriate judicial authority in London, England enter such orders as British law permits, directing EVA BROOKE to appear as soon as physically possible before the undersigned in Room 518 of the United States Courthouse, 40 Centre Street, New

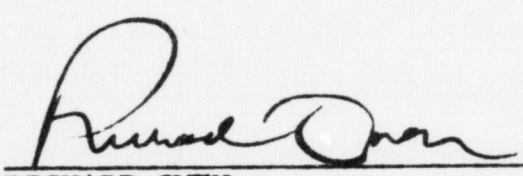
Letters Rogatory.

York, New York to give evidence in the criminal trial now pending before this Court, and directing such other steps (such as arrest and extradition) that may be necessary in order to secure compliance with such orders.

6. This Court expresses its appreciation to the appropriate judicial authority in London, England for its courtesy and assistance in this matter.

Dated: New York, New York

January 14, 1975



RICHARD OWEN
United States District Judge

PRETRIAL INTERVIEWS.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 74 Cr. 599(RO)

JACKSON D. LEONARD, :

Defendant. :

----------x

January 6, 1975
1:10 p.m.

Deposition of ARNOLD REINER, taken by defendant pursuant to agreement of counsel, at Rooom 301-B, United States Courthouse, Foley Square, New York, New York, before Herbert H. Prokop, a Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES:

PAUL J. CURRAN, ESQ.
United States Attorney for the
Southern District of New York
BY: W. CULLEN MACDONALD, ESQ.,
Assistant United States Attorney

KOSTELANETZ & RITHOLZ, ESQS.
Attorneys for defendant
80 Pine Street
New York, N.Y.
BY: JOHN J. TIGUE, ESQ.,
Of Counsel

- - -

A R N O L D R E I N E R, called as a witness, being first duly sworn by the reporter, testified as follows:

EXAMINATION BY

MR. TIGUE:

Q Mr. Reiner, my name is Jack Tigue. I am the attorney for Mr. Leonard. How long have you worked for the IRS, Mr. Reiner?

A It will be five years in May.

Q Prior to going with the IRS, were you in private practice in accounting, Mr. Reiner?

A I was.

Q For how many years?

A About twenty-three years.

Q Did there come a time when you were assigned to the Jackson Leonard case?

A Yes.

Q Can you tell us when that was, sir?

A The first time I went out was approximately May 4th, I believe, 1972.

Q And that was to Mr. Leonard's office or Mr. Leskowicz's office?

A Mr. Leonard's.

Q That was the first time you had done anything on the case at all?

A That's right.

Q I am looking at what I think is your activity report, which the first date is September 1, 1972, is that right? Is that your report?

A Yes, it is.

Q Were there any entries on any other activity report prior to September of '72?

A It might have been on Mr. Tragna's report. There is a date here, 5/4, 5/5.

Q It would be on your own activity report the conduct you engaged in, on May 4, 1972 and thereafter, is that right?

A Right.

Q On that date, May 4, 1972, is that the first time you met Jackson Leonard?

A It was.

Q And did you attend an interview some time after that, I think it was July 5, 1972? I will show you this to refresh your recollection.

A Yes, I was there that day, Mr. Leskowicz was there.

Q Other than those two occasions did you have occasion to speak with Mr. Leonard, other than yesterday or the day before, when you said hello?

A Yes, after those dates I had been assigned to do the '65 return or to terminate the '65 return.

Q And to commence the '68 audit?

A That had already been commenced.

MR. MACDONALD: Rather than talk about what years you were assigned I think Mr. Tigue wants you--

Q Just in fairness, the 1968 audit began May 4, 1972, if you look at Mr. Schulman's report.

MR. MACDONALD: You don't mean to suggest that year wasn't in question for many months prior?

MR. TIGUE: I suppose it was but I am trying to find out what the facts are.

Q Is that when you started to work on the '68

audit?

A Right.

Q During the course of the audit of the 1968 return, did you have occasion to talk to Mr. Leonard?

A I did.

Q And other than the May 4th and July 5th meetings, how many times did you speak with him?

A It is hard for me to say.

Q Once or twice or many times?

A A few times. But, basically my conversation with him was when Mr. Leskowicz was also present.

Q I have before me your activity reports, and what looks like an R&R?

A Right.

Q Other than the documents I have before me, do you have any notes of those conversations with Mr. Leonard?

A No. Nothing except what you have in front of you.

Q Did Mr. Leonard ever refuse to answer any of your questions?

A No.

Q How long did you work on Mr. Leonard's tax returns? I notice there are entries to December 5,

1972 on your activities report.

MR. MACDONALD: I think I should call to Mr. Reiner's attention as to his answer a moment ago with respect to the documents you have before you, Mr. Reiner has not examined that packet.

I put that together last night. He doesn't really know what the contents of it are.

Q Please take a look at it, Mr. Reiner.

A Thank you.

MR. MACDONALD: In addition, there is a file Mr. Reiner brought over to me last week that contained various scribblings he and I have yet to go over and we will produce what is produceable from that file as soon as possible.

THE WITNESS: Do you want me to go through this whole --

Q The purpose of my question is if there were any written notes, ~~I would like to see them and if~~ there are such --

A No, no others.

Q Essentially Mr. Reiner, you were the revenue agent who was assisting Mr. Schulman in the Intelligence Division investigation?

A That's right.

Q You worked principally under his direction?

A Right.

Q Other than those two formal interviews with Mr. Schulman, and the conversations you already told us you had with Mr. Leonard, did you have any further conversations, formal or informal?

A With Mr. Leonard?

Q Yes.

A I would say no, outside of a conversation, good morning, you know.

Q Other than pleasantries.

A Pleasantries, right.

Q Going back to May 4, 1972, do you recall the conversation that took place at that time, Mr. Reiner?

A Please direct me as to the point of your statement.

Q You had a meeting with Mr. Leonard and Mr. Schulman and Mr. Leskowicz and Mr. Tragna on May 4, 1972.

A Right.

Q Do you remember what was said at that meeting? Just yes or no.

A It's hard to recollect.

MR. MACDONALD: Mr. Reiner, you are entitled to ask Mr. Tigue for the use of any document that you are aware exists in answering his question as to your best recollection. There is no need to answer yes or no.

If there is a piece of paper which would help you, Mr. Tigue ought to show it to you in fairness.

MR. TIGUE: I fully intend to. I am asking first if Mr. Reiner recalls the conversation and if he says yes, I will ask him what was said and if he says no, I will give him the piece of paper.

MR. MACDONALD: He has already given you the existence of the conversation on May 4th. Why don't you ask him what was said, not what he recalls.

MR. TIGUE: He can't say what he doesn't recall.

MR. MACDONALD: All right, ask the question.

Q You were present at a conversation with Mr. Leonard, right?

A Right.

Q Do you remember independently or do you

need the memo of Mr. Schulman, which I will be glad to give to you?

MR. MACDONALD: Don't answer that question. Ask for his best recollection.

Q Give me your best recollection.

MR. TIGUE: Do you want to conduct the interview, Mr. MacDonald?

MR. MACDONALD: I don't want you to quote unfairly.

MR. TIGUE: I have no intention.

MR. MACDONALD: I will allow you to ask any question you want in any fashion you want.

MR. TIGUE: If a witness says black and he gets on the witness stand and says white, I will ask him in front of the jury did he say a different color at a prior date.

MR. MACDONALD: What you have been concerned about is, do you have any recollection.

Q Tell us what your best recollection is.

A To the best of my recollection, and I am trying to visualize again, we were introduced, I said I would be the agent to replace Mr. Tragna on the case, and I think Mr. Leonard came in, Mr. Leskowicz was there, we were introduced and Mr. Schulman read the

Fifth to Mr. Leonard and I kept on doing my work because Mr. Schulman was then asking certain questions of Mr. Leskowicz and Mr. Leonard -- I didn't pay too much attention to that -- we went for lunch, and we came back and certain statements were made.

We went to lunch, came back, I continued with my work and I requested the general ledger and checks from Mr. Leskowicz and Mr. Tragna also requested the same.

A little discussion developed, Mr. Leskowicz would only show us certain checks pertaining to what he thought we should see.

Q That is for 1968?

A 1968. Basically for the corporation, because that is the work I was doing. They were not running in sequence, a certain number of checks, and Mr. Leskowicz said it does not pertain to the audit, you are not going to see it.

A little discussion developed and that was as far as it went. Mr. Schulman had left previously.

Q Did Mr. Leskowica persist in his refusal to supply you with documents?

A Yes.

Q Did you go to Mr. Leonard and ask him for

his help?

A No.

Q Which checks were those or documents?

A They were checks that had to do with the corporation and I believe it may have been -- I am trying to recollect -- Mr. Leonard's personal, which had been written also, I think on the Schedule C.

Q Did this have anything to do with Union Carbide?

A Not as far as I know. We couldn't form any opinion.

MR. MACDONALD: Because you didn't know --

THE WITNESS: We didn't know what they were.

Q Did you ever get those checks?

A No.

Q Did you get microfilms from the bank?

A No.

Q I guess it was shortly thereafter that it was referred to the final conference or something with Mr. Alleva, and Mr. Schulman?

A Right. Also, Mr. Leskowicz had stated to me, I think it might have been on the 5th, that if I wanted any photostats or information, I would have

to write it all by long hand.

Q You requested --

A I requested a photostat of something and he said "You're going to write it all."

Q Mr. Leskowicz said you would have to write it?

A Yes.

Q When did you stop working on the audit?

A I'm sorry, I'm holding you up, but --

Q No problem. Take a look at your activity sheet. You can look at this one.

A The reason that I stopped is that '65 had been under examination also, and it seemed that collection had come into the picture and placed a lien or levy on Mr. Leonard's margin account. And, ten minutes or five minutes after they had notified I walked in and all hell broke loose at me.

Q What date was this?

A I think it might have been July.

Q Of '72?

A '72. And, I said I have nothing to do with it, this is the first thing I knew about it.

Well, it was straightened out. I made a couple of phone calls and it was cleared. And then, I had a meeting, Mr. Lefkowitz had come over -- the collection supervisor asked me to come down and tell him what occurred and I did and then I got permission to detach '65 and close it because the taxpayer was fuming.

And in the conference, the appellate conferee had State income which appeared in '65 belonged in '65 and therefore the taxpayer had a credit of $65,000 this was his contention, that service was coming in to collect on '64, and at least finish '65, so they could balance it out.

That's when I started on the '65 return.

At that point, I don't believe I did any more on the '69. The corporation which had a fiscal year, I don't believe I did any work on the corporation's return or the '68, except to set up the final report.

Q Did you stop working on the case until the indictment came up?

A I kept working on '65.

Q Has that been closed out, '65?

A As far as I'm concerned it has been closed out.

Q Have you written the revenue agent's report?

A Yes, I have.

Q Has that been given to Mr. Lefkowitz?

A No, because while this is pending, the Service will not close '65, as far as I know.

Q Have you been asked to be a witness ~~in~~ this case, Mr. Reiner?

A Not yet.

Q Let me go back to the May 4, 1972 meeting, and I would like to refer you to a section of Mr. Schulman's memo, if it helps to refresh your collection, entitled "Unreported Income from Union Carbide on Services Performed by Treadwell Corporation."

Were you present while this was being discussed?

MR. MAC DONALD: As a matter of my

education, does Lefkowitz have the '66, '67, '68 1040?

MR. TIGUE: The Government does not release it while a criminal case is pending.

Q Have you read that?

A Yes, I have.

Q Were you present during that part of the discussion?

A I believe I was.

Q Can you tell us to the best of your recollection, or whatever you remember about the conversation.

Tell us what was said by Mr. Schulman, by Mr. Leonard, and yourself or in anybody else's presence.

A I believe, as I recollect, the conversation was between Mr. Schulman and Mr. Lefkowitz and Mr. Leonard, about certain bills or certain receipts being ten per cent higher and Mr. Leonard said he would then go ahead and try to find any ~~informatior~~ ~~he~~ could to give to Mr. Schulman.

That was as far as I recollect.

Q Did you take any notes at the May 4th meeting with Mr. Leonard?

A The only notes I took was the work I was doing, checking out checks.

Q On the regular revenue agent's work?

A Yes.

Q What about in July of 1970, did you take notes during that meeting?

A No.

Q Were you present at the entire meeting?

A Is that the meeting you are referring to, with Mr. Lefkowitz?

MR. MAC DONALD: Yes.

A No, I didn't take notes. I sat in on a conversation.

Q Were you present at the whole meeting?

A Yes, I was.

Q Could you tell us to the best of your recollection what Mr. Leonard said during the course of that meeting?

A One question I -- rather, Mr. Leskowicz stated at that point we would get full cooperation and Mr. Schulman then said "Reiner, tell Mr. Lefko witz what Mr. Leskowicz said", and I told him and Mr. Lefkowitz looked at Leonard and smiled, and I believe he said "give him whatever he wants, don't

play games with him.

Q Mr. Lefkowitz said that?

A Mr. Lefkowitz said that.

Q I thought before that you had gone to Mr. Lescowicz and asked him for some documents and he refused?

A He refused.

Q And even the document he did produce, he said you must copy them in longhand?

A He produced no documents, but he said from here on anything I want to have to be in long-hand.

Q That was Mr. Lescowicz?

A Yes, the accountant.

Q Then on July 5th, who is it who said we are going to cooperate fully?

A Mr. Lefkowitz.

Q The lawyer?

A The lawyer.

Q And at that point you reported to Mr. Lefkowitz what Mr. Lescowicz had said?

A Right.

Q And Lefkowitz said to Leonard "Make sure he gets everything he wants."

A Right.

Q Thereafter did you have difficulty getting documents?

A None whatsoever.

Q Would you continue, to the best of your recollection, as to what was said during that meeting?

MR. MAC DONALD: I would just like to add to that last question --

BY MR. TIGUE:

Q Was Mr. MacDonald there?

MR. MAC DONALD: It was a leading question. I am sitting here, thinking that Mr. Tigue really wants information. Would you read items 1, 2 and 3 in the report, in respect of Union Carbide documents and then tell us if you had any difficulty in getting those documents. i.e., did you ever get any of them?

THE WITNESS: As far as Union Carbide, no.

MR. MAC DONALD: So you had difficulty getting Union Carbide documents, didn't you?

THE WITNESS: Well, let me state that at this point I myself didn't request the Union

Carbide documents. Schulman did.

MR. MAC DONALD: He had the difficulty.

THE WITNESS: Right.

BY MR. TIGUE:

Q But not you?

A No.

Q Would you continue, please, unless Mr. MacDonald has further redirect, as to what took place during the course of the conversation?

MR. MAC DONALD: You may use whatever documents you need to refresh your recollection concerning the content of that conversation.

A Well, I remember saying, when I got back to continue my work, that Mr. Leonard would supply me with the information that Mr. Schulman requested, specifically point 3 here.

Q First of all, I would like you to tell me what you remember about the meeting and if you have trouble remembering, please take a look at it to refresh your recollection, and then tell me what you remember.

It is pointless to look at the document and read it off.

MR. MAC DONALD: Let the record reflect he has yet to look at page 2.

Q Do you remember what happened about the explanation of the Treadwell UCC problem?

A Frankly, ~~no~~.

Q Would you take a look now at page 2, please.

A Fine, go ahead, Mr. Tique.

Q Can you tell us what was said by all parties regarding whatever else was said, namely, the --

A Yes. Mr. Leonard stated that he had to get construction going. He had to make some pay-offs and that he took the money down twice, I think it was, once in October and once in February.

He mentioned the name but at that time it didn't stick with me. I see Zelman is the name.

And that this is the $85,000, in round figures. Then, at that point, I believe Mr. Lefkowitz stated he had to get back to Court, would we please make another meeting and if there is any other information he would see it was gotten over to Mr. Schulman.

Q Did you ever attend any further conferences

where Mr. Lefkowitz was present?

A No.

Q Did you ever converse with Mr. Leonard about the subject matter which you just referred to, that is, the payments?

A No.

Q You had no further conversations at all?

A No further conversations.

Q During the course of your audit, did you generate some work papers?

A As far as '65 was concerned, yes.

Q Other than '65. With respect to '68.

A I generated a work paper on the corporation.

Q I am not clear which one you were auditing. Were you auditing the 1040 of Mr. Leonard --

A The 1120.

Q Mr. Leonard's 1969 return had already been audited, is that right?

A That's what Mr. Leskowicz had told me.

Q That wasn't true.

A It was true, except the thing is, the return, the 1040 -- if there is a partnership and corporation, 1120S, Service at times doesn't pull it.

Q In a subchapter S corporation the income earned by the corporation flows through the individual, just like a partnership?

A That's correct.

Q You include the income in the year when the fiscal year ended?

A That's right.

Q The corporate income would be included in the 1040 for 1969 then?

A That's correct.

Q So that his 1040 had been audited but the agent had not audited the 1120S?

A Right.

MR. MAC DONALD: Why don't you, instead of giving Mr. Tigue hearsay information, you can tell the agent to write to him.

Q Did you audit Mr. Leonard's 1968 return?

A I wrote the final report, whatever findings there were, since I was the last agent on the case, I wrote the final reports for whatever years there were.

Q Based upon Mr. Tragna's work papers?

A Yes.

Q Did you recommend a civil fraud penalty?

A I didn't.

MR. MAC DONALD: You have the written ones there. If you want oral ones --

MR. TIGUE: No. I don't believe I have any more questions of Mr. Reiner.

(Discussion off the record.)

Q On this page it says "Income as Reported in 1967 Return" and it has UCC and some payments. In the lower left it says $100,000. I can't make out that handwriting.

A Nissen.

Q That doesn't have anything to do with UCC?

A No.

MR. TIGUE: I have no further questions.

Thank you very much.

(Time noted: 1:40 p.m.)

Subscribed and sworn to before me

this ___ day of _____ 1975.

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CERTIFICATE

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, HERBERT H. PROKOP, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That, ARNOLD REINER, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of January 1975.

HERBERT H. PROKOP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

vs. : 74 Cr. 599 (RO)

JACKSON D. LEONARD, :

Defendant. :

----------x

January 2, 1975,
10:20 p.m.

Depositions of JERRY SUSSMAN, BERNARD M. SINGER, JOHN ALLEVA, NORMAN A. LEVY and ROBERT SCHULMAN, taken by defendant pursuant to agreement of counsel, at Room 301-B, United States Court House, Foley Square, New York, New York, before Leon Zuck, a Certified Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney
For the government
BY: W. CULLEN MAC DONALD,
Assistant United States

KOSTELANETZ & RITHOLZ, ESQS.,
Attorneys for defendant
80 Pine Street
New York, New York
BY: JOHN J. TIGUE, JR.,
of Counsel

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J E R R Y S U S S M A N, called as a witness by defendant, being first duly sworn by the notary public, testified as follows:

MR. MAC DONALD: This deposition is being taken pursuant to agreement reached by Mr. Tigue and myself in response to his letter request to Mr. Sussman for an opportunity to interview him concerning Jackson D. Leonard. It is explicitly understood between us that Mr. Sussman shall have an opportunity to read the daily copy transcript of this deposition and make whatever changes he deems appropriate before it will be considered his prior statement.

MR. TIGUE: I'd like the record to

be clear that it is true that there is some agreement between counsel in that Mr. MacDonald is permitting me to use his office and he has arranged to have Mr. Sussman present. However, I did send my letter directly to Mr. Sussman and the following statement applies to all the interviews which will take place today and the few days afterwards, if they continue that far, and that is that I do object to the presence of Mr. MacDonald. I think I have a right to interview Mr. Sussman and the other witnesses without his presence and Mr. MacDonald has indicated he will perhaps object to a number of the questions that I will ask these witnesses and I do not consent to that. Indeed, I vigorously object to his directing the witness to answer my questions.

But be that said, at least for the moment I will conduct the interviews as best I can in his presence since he insists on being present and we will take whatever course is necessary with respect to any directions to the witness not to answer my questions.

MR. MAC DONALD: I doubt if either of these colloquies will be read to the jury, but

it should be understood that the witnesses have referred their requests from Mr. Tigue to me and have indicated the desire for the assistance of counsel in dealing with defense counsel in this interview, and it is on that basis which the arrangement, whereby a written record of the interview would be made, was arrived at. The witnesses don't desire to have counsel's recollection where a record could be made instead.

Finally, if there is an occasion when Mr. Tigue feels that he is entitled to an answer where we definitely refuse to allow an answer he should, as I am sure he understands, go to the judge and see what Judge Owen orders in that regard.

MR. TIGUE: Surely.

With respect to the transcript of this, I certainly consent to that. It seems to me that's the fairest thing to do, and I think also that if the prospective witnesses want their attorneys present they have a right to do that. I don't believe that you are their attorney. And even if it were suggested you be their attorney I would think there would be the strongest conflict of

interest, and I think on those grounds you would have to excuse yourself.

EXAMINATION MR. TIGUE:

Q Mr. Sussman, you work for the Internal Revenue Service?

A I do.

Q You are a collection agent?

A Revenue officer.

Q And you are a supervisor?

A Correct.

Q Do you know a man of C. Margoles, M-a-r-g-o-l-e-s?

A Yes.

Q Who is he?

A A revenue officer.

Q Did he work for you?

A For a period of time.

Q A man by the name of B. Cuttler?

A Yes. Another revenue officer.

Q He worked for you?

A Yes.

Q And Mr. Chessman, do you know Mr. Chessman?

A A fellow group manager, supervisor, revenue

Officer, who was my predecessor in the group.

Q Have you ever met Mr. Jackson Leonard?

A No.

Q Have you ever spoken to him?

A No.

Q By that I mean on the phone or in person.

A Not to my recollection.

Q Do you have in your possession any statements or writings which purport to be from him or any of his representatives?

MR. MAC DONALD: Do you mean here today?

MR. TIGUE: Let's start with here today.

A No.

Q Do you have them in your files?

A No. Not in my files.

Q Well, do they exist, that you know of?

A Not to my immediate knowledge, no.

Q What knowledge do you have of such statements?

A Simply let's say a --

MR. MAC DONALD: Such statements referring to whatever is in the files that you are

asking about?

MR. TIGUE: I would like to know if Mr. Sussmam has ever seen or heard of any statements by Mr. Leonard or his representatives, and by that I mean accountants and lawyers.

MR. MAC DONALD: In what form?

MR. TIGUE: Written, I suppose.

Q Written.

A No.

Q You don't know of any such statements?

A No.

Q Do you know of any oral statements which were written down by you or any other IRS employees?

A I know of some oral statements but they were third hand.

Q Were they written down?

A Possibly in history sheets.

Q Do you know where those are today?

A No, I do not.

Q Have they been turned over to Mr. MacDonald?

A I do not know that.

Q Have you reviewed your files at all on the Leonard case before you came here today?

A No, I did not.

Q Who would know where these statements are?

A I would imagine -- this is a guess -- possibly some people in Intelligence, whoever is handling the case.

Q In any case, you don't know?

A No. Our files are closed.

Q Did you have any responsibilities in connection with Jackson Leonard?

A Yes.

Q What was the nature of those responsibilities, the collection?

A To see that a particular tax year, which I do not remember, was collected. Moneys outstanding for income tax.

Q Do you remember that they were not for '67 and for '68?

A I do not believe they were for '67 and '68.

Q Prior years?

A I think it was a prior year. I think it was a year.

Q Do you have any knowledge of Mr. Leonard

in this connection, if any, with Union Carbide?

A Not at all.

Q Do you know of any income he may have received under any agreements with Union Carbide?

A Not at all.

Q When is the last time, prior to receiving a letter from me, did you discuss the Leonard case with anyone?

A The date can only be approximate but it would be more than two years ago.

Q Have you given any statements to Mr. MacDonald with respect to Mr. Leonard?

A I have not.

MR. MAC DONALD: By that you mean a written statement?

MR. TIGUE: Yes, a written statement.

Q Whatever happened to that collection matter, was that paid?

A That was finally paid, yes.

Q Who had the direct work? You were a supervisor at that time as well?

A I was the supervisor.

Q Who were you supervising, Mr. Margoles or Mr. Cuttler or both?

A Mr. Margoles had the case originally. Mr. Cuttler succeeded to the case. And he was the person who was successful in making the collection.

Q Have you been asked to be a witness at the Leonard trial?

A No.

Q Mr. MacDonald has questioned various witnesses about the possibility of Mr. Leonard having a Swiss bank account. Do you have any such knowledge?

MR. MAC DONALD: Why don't we take under-advisement that question and remit Mr. Tigue to Judge Owen if he wants to make any application in that regard.

MR. TIGUE: Are you directing Mr. Sussman not to answer.

MR. MAC DONALD: We are taking under advisement the propriety of that question.

MR. TIGUE: Is he going to answer the question or not?

MR. MAC DONALD: Not at this time. We will think about it.

Q Have you discussed the Leonard case with

special agent Schulman at all?

MR. MAC DONALD: Just to expedite matters I think I will start questioning the propriety of asking about interagent communications. They aren't admissible in evidence at the trial, and I really don't know what purpose it would serve to start to create a record of just interagent communications of which there must be thousands. If you really have a specific one in mind I would like to deal with it.

MR. TIGUE: I thought my question was specific. I asked have you discussed the Leonard case with Mr. Schulman or not?

MR. MAC DONALD: Answer it. It's faster than arguing.

Q Mr. Sussman, would you tell me what your phone number is so I can contact you if I needed to, so it will be on the record?

A 264-3384.

Q Thank you very much, Mr. Sussman, for coming today.

Subscribed and sworn to before me

this day of , 1975.

BERNARD M. SINGER, called as a witness by defendant, being first duly sworn by the notary public, testified as follows:

EXAMINATION BY MR. SINGER:

Q Mr. Singer, you work for the Internal Revenue Service?

A Yes.

Q You are a supervisor, are you not?

A That's right.

Q Of revenue agents?

A Yes.

Q Can you tell me when the first time you ever heard the name Jackson Leonard was?

A The first time I heard the name Jackson Leonard is when Mr. Lask --

MR. MAC DONALD: The question is when, meaning a date. Your best recollection as to a date.

A Some time around, I would say, the summer of '69, to the best of my recollection.

Q Where did you hear that name from?

A Mr. Laski.

Q Was he in your group, Mr. Singer?

A No.

Q How did you have occasion to speak with him about Mr. Leonard?

MR. MAC DONALD: I object to the question.

MR. TIGUE: When you say you object, you are directing him not to answer?

MR. MAC DONALD: Unless there is some further relevance. You are asking for an interagent communication and I don't think it is relevant.

Q Did there come a time, Mr. Singer, when you were responsible for the Leonard case, that is, it was in your group?

A Yes.

Q When was that?

A About the summer of '69.

Q Was Mr. Laski in your group?

A No.

Q Do you know an agent by the name of Tragna?

A I know two agents by that name.

Q I think it is J. Tragna.

A Joseph?

Q Yes.

A Yes.

Q Is he in your group?

A No.

Q Was he in your group?

A No.

Q How about Mr. Reiner?

A I know Arnold Reiner.

Q Is he in your group or was he?

A Subsequent to '69, yes.

Q Was he assigned the Leonard case in the summer of '69?

A No.

Q Who was after Mr. Laski left?

A I was.

Q You were the supervisor at the time, weren't you?

A No, sir, I was an agent at that time.

Q The case was assigned to you in the summer of 1969?

A To the best of my recollection, yes.

Q Did you conduct an audit of Jackson Leonard?

A No, I never met the taxpayer.

Q Did you ever speak to him on the telephone?

A No.

Q Do you know a man by the name of Edward Leskowicz?

A Edward?

Q Yes.

A No.

Q You never spoke to him?

A No. I don't know him.

Q Were you in charge of the audit of Jackson Leonard?

A After Mr. Laski, yes.

Q Isn't it customary to meet with the taxpayer's representative when you are in charge of the audit?

MR. MAC DONALD: Objection. Custom is not something we really need to pursue on this record.

Q What did you do in connection with the audit of Jackson Leonard?

A I just took --

MR. MAC DONALD: I think, unless there is some particular need to -- withdrawn. Since there were no contacts with the taxpayer or his

lza Singer 16

representative, the question calls for inter-agent communications or internal workings, and I will direct the witness not to answer unless you have some specific -- something in mind.

MR. TIGUE: It seems to me that when you have interviewed witnesses who are in some way related to Mr. Leonard you have asked questions which seem to me to be unbelievably unrelated to the case at hand, and I have never directed any of the witnesses not to answer even though I failed to see the relevance of many of these questions. Indeed, Mrs. Mineko Leonard was asked about things back in 1961 and this case relates to '67 and '68. So I don't think I'm limited to your interpretation of what's interagency. I don't know why there should be such limit.

This is not a question of admissible testimony at trial; it's attempting to find out what a prospective witness knows about the facts of the case. I don't intend to limit my questions in that regard.

MR. MAC DONALD: With respect to interagent communications, you will have to see the judge, at least insofar as it relates to Mr.

Singer and the question that is put.

Q What did you do besides interagency communications?

A I did nothing with the case. I never contacted the taxpayer or his legal rep.

Q How long were you assigned to the case?

A Very short period of time.

Q A month?

A Maybe a month or two. I don't remember.

Q Less than six months?

A Yes.

Q You contacted no one outside the government on the case, that is, banks, brokers, witnesses?

A Nobody, to my knowledge.

Q Did you take the elastic band off the file?

A If it's agreeable with you, I can answer what I have done.

MR. MAC DONALD: He has received an adequate answer. The last question was a facetious one.

Q The case was assigned to you. Tell

me what you did after that?

A I did nothing with the case and just held it.

Q Have you been asked to be a witness in this case?

A No.

Q Mr. MacDonald asks questions about prospective witnesses, about Swiss banks?

Do you have any knowledge about whether or not Mr. Leonard or any of his -- well, Mr. Leonard has or has not any such Swiss bank account?

MR. MAC DONALD: That question we will take under advisement in the same fashion as the last witness. The "any knowledge" obviously includes interagent communications as well as external ones, and if you make no effort to narrow your question to something admissible I will make no effort to do it for you.

MR. TIGUE: Outside of interoffice agency communications, do you have any such knowledge?

MR. MAC DONALD: Don't answer that question. You are instructed not to answer.

Q Have you discussed the Leonard case

with Mr. Schulman?

A No.

Q What is the last contact you had with the Leonard case prior to receiving a letter from me requesting this interview?

A I transferred it to another agent.

Q Who is that?

A Truthfully, I don't know. I think it was Tragna but I am not sure.

Q After you transferred to Tragna -- that would be in the fall of 1969, roughly?

A Yes.

Q You have had no contact with the Leonard case since then?

A Mr. Reiner joined my group and he had the case in his inventory.

Q When did you become supervisor, Mr. Singer?

A Officially May of 1971

Q And Mr. Reiner was in your group --

A He became an instructor in my group approximately at that time.

Q Did you discuss the case with Mr. Reiner after you became his supervisor?

A Other than doing an inventory work load study, no.

Q And you still have not?

A No, I haven't talked to him at all.

Q Is he still in your group?

A No.

Q When was he transferred out or when were you transferred out?

A I was transferred out in December of '72, I became a supervisor in another group.

Q So since December of 1972 is it true that you have not discussed the case with anybody until you received my letter?

A That is absolutely right.

MR. TIGUE: Mr. Singer, thank you very much for coming today.

EXAMINATION BY MR. MAC DONALD:

Q I would like to show you a government exhibit which has previously been marked 591 and ask you to look at an entry.

A That's mine.

Q And I want to put the same question that Mr. Tigue put to you and ask you, before answering it --

MR.TIGUE: May I see it?

MR. MAC DONALD: No.

Q -- to read the notation and the question was, did you have any contact with the taxpayer's representative, including telephone contacts, and on reaidng this document does it refresh your recol-lection that you have?

Maybe it doesn't.

A It's more than four years ago. I see that I did contact the taxpayer and he told me that --

Q Don't tell us necessarily what he told you. But it does refresh your recollection that there was a --

A Right. That would be the only con-tact that I remember.

Q In addition, is your recollection refreshed from a reading of the whole document that vou conducted some work from time to time during the period under which the case was assigned to you?

A I did not do any work other than review the case with interagency individuals and all and other than this.

Q Did vou authorize a -- withdrawn.

MR. MAC DONALD: I don't have anything further.

BY MR. TIGUE:

Q When you referred to "this," what did that word "this" mean?

A The document he just showed me.

Q Your recollection is refreshed now. Tell me what you did other than talk to your colleagues at the Internal Revenue Service?

A According to the document, some time in August of 1970 I had contacted the taxpayer and left a measage there for him, and I was told that a Mr. Lefkowitz was his attorney and I called subsequent to that. It says that Mr. Lefkowitz was not his attorney.

Q For the court reporter, there are two similar names: Leskowicz is a CPA, and Mr. Lefkowitz, like the Attorney General of the State of New York --

A That's the name I remember, Jacob Lefkowitz.

Q The attorney?

A Yes. That he hadn't been retained by the taxpayer.

Q You will excuse my big eyes but I believe I just saw an activity report. Is that what you were referring to?

A Yes, that's an activity report.

MR. TIGUE: I gather you are not going to permit me to see that, is that right?

MR. MAC DONALD: You are not entitled to it.

MR. TIGUE: Whether I am entitled or not, you will not permit me?

MR. MAC DONALD: Right.

Q Does that activity report refresh your recollection as to who else worked on the case besides Mr. Laski?

A No.

Q Yourself --

A There is nobody that worked on the case -- this activity record only shows mine.

MR. MAC DONALD: This page 591 which is before you.

THE WITNESS: Only shows my activity record.

Q Do you know if there are any other revenue agents who worked on the case, the Leonard

case?

A No.

Q Do you know Mr. J. Rothstein?

A No.

Q Do you know a Mr. Laskowitz?

A No.

Q Do you Agent Levy?

A Agent Levy?

Q I mean Special Agent Levy?

A Norman Levy, yes.

MR. MAC DONALD: He is not a revenue agent.

THE WITNESS: A special agent.

MR. TIGUE: I misspoke.

Q Have you discussed the Leonard case with Mr. Levy?

MR. MAC DONALD: You don't need to answer that.

MR. TIGUE: I don't at the moment want to know what the conversation was; simply whether he discussed it with him.

MR. MAC DONALD: Did you ever have any conversations with Agent Levy?

Q Special Agent Levy.

MR. MAC DONALD: In respect of this matter.

THE WITNESS: To my knowledge, no.

Q The same question with respect to Special Agent Alleva.

A No.

Q And I believe you have already answered with respect to Mr. Schulman, you have not discussed the case with him?

A That's right.

MR. TIGUE: I think I have run out of questions, Mr. Singer. I thank you very much for coming.

I do have one more question. Do you want to ask your question first?

MR. MAC DONALD: Yes.

MR. TIGUE: Pardon?

MR. MAC DONALD: Yes.

BY MR. MAC DONALD:

Q I direct your attention to a single entry -- two entries on document 2493 and ask you to read those to yourself and see if it -- if they refresh your recollection concerning discussions with Levy.

A According to the document you show me, it is not mine, that I did have a discussion with the Special Agent Norman Levy.

Q The document simply doesn't help you refresh your recollection on that score?

A No, other than what it says there. If it says so, then I did have it, and it's a long time ago. I don't remember.

BY MR. TIGUE:

Q Can you tell us when that conversation with Mr. Levy was?

MR. MAC DONALD: Do you remember.

A Well, being a special agent I imagine it had something to do with a case --

MR. MAC DONALD: The question is when.

THE WITNESS: When?

MR. MAC DONALD: When.

A According to the document just shown me, September.

Q September of what year?

A '70.

Q Can you tell me --

MR. MAC DONALD: In fairness, I think

another question should be put.

Does this document refresh your recollection that you received the case on or about July 20, '70 and not the summer of '69 as your best recollection was at the beginning --

THE WITNESS: '70. The way it looks here it was '70. That's when I received the case.

BY MR. TIGUE:

Q At that time you had a conversation with Special Agent Levy?

A Two months subsequent, yes.

Q And your immediate predecessor on the case was Mr. Laski?

A That's correct.

Q And who succeeded you in the case, Mr. Tragna, as far as you can --

A As far as I can remember, I think I transferred it to him.

Q That was the other question I had. I thought you got the case in the summer of '69 and then you had a conversation with the taxpayer in 1970. It didn't fit together.

A According to the activity record, it

was in '70. Yes. I spoke to the taxpayer approximately one month after I received the case. In other words, August of '70.

Q Mr. Singer, do you want to read what he is showing you?

A I read it.

Q Do you have in your possession any records relating to the Leonard case, in your personal possession, in your actual possession in your office?

A No, I don't have.

Q Have you turned any documents over to Mr. MacDonald or to anyone else relating to this case?

A The only document I turned over to Mr. MacDonald was the letter I received from your office.

MR. TIGUE: Thank you.

Subscribed and sworn to before me
this day of , 1975.

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MR. MAC DONALD: Mr. Alleva was scheduled for annual leave today and tomorrow and has agreed to have his deposition taken by telephone instead of his actually attending and he is on the telephone and prepared to take the oath and answer Mr. Tigue's questions.

Why don't you swear him in.

J O H N A L L E V A, called as a witness, being first duly sworn over the telephone, testified as follows:

EXAMINATION BY

MR. TIGUE:

Q Mr. Alleva, my name is John Tigue. I am the attorney for Jackson Leonard. I thank you for consenting to an interview.

I'll try and be as brief as possible because it is difficult on the phone.

You are a group supervisor now, are you?

A Yes.

Q In the Intelligence Division?

A Yes. Effective Sunday I will be the Assistant Chief in the Brooklyn District.

Q Congratulations.

A Thank you.

Q You did some work on the Leonard case, did you not, sir?

A Yes.

Q Can you tell us when that case first came to your attention?

A I didn't -- this is to the best of my recollection. I don't recall the actual dates. It was in the latter part of '71 that I was assigned. It was transferred to me from another agent who had the case and I held it for approximately five months, as I recall. And it was again transferred to another agent.

Q Who was the agent that had it before you did?

A I think it was Norm Levy, Special Agent Norman Levy.

Q Can you give me an approximate date when it was assigned to you?

A I would say the fall -- I would say September of '71 approximately.

Q And then who was your successor in the case, who took it after you did?

A That would be Bob Schulman.

Q Just to give you a point of reference, on

lzrf 3 Alleva

December 12, 1972, you had what is called a final conference with Mr. Leskowicz, an attorney on behalf of Mr. Leonard, do you recall that?

A Yes.

Q You and Mr. Schulman were present?

A Yes.

Q Other than that date, have you had any conversations -- strike that -- have you ever had a conversation with Jackson Leonard?

A I don't recall, no.

Q Other than that date with Mr. Leskowicz did you have any other conversations with Mr. Leskowicz?

A I don't recall any conversations but I may have briefly spoken to him on the phone.

Q If you did, you would have made a note?

A Yes, it would have been indicated in my chronological and I would have had a memorandum of conference covering it either separate from the chronological or incorporated in the chronological.

Q And you left all those statements with the file when you reassigned it to Mr. Schulman, is that correct?

A Absolutely.

Q Now, to the best of your recollection you never

lzrf 4 Alleva

had a conversation with Mr. Leonard, is that correct?

A Correct.

Q What else did -- what other functions did you perform on the investigation starting in September of '71?

MR. MAC DONALD: I am going to instruct you not to answer that question insofar as it calls for descriptions of internal agency procedures and communications. If you remember anything, doing anything external to the IRS, you may answer the question.

THE WITNESS: No, I did not. I don't recall doing anything external to the IRS. I am certain I didn't, as a matter of fact.

Q Your only conversations were with fellow IRS employees?

A Yes. It would be either --

MR. MAC DONALD: Don't bother.

A The personnel of the Internal Revenue Service.

Q When did you reassign it to Mr. Schulman?

A I don't recall that exactly. I think it was about, it would be possibly in the spring, around March of '72, I would just take a guess, approximately March.

Q When you attended the interview in December

lzrf 5 Alleva

of '72, that was in your capacity as Mr. Schulman's group supervisor?

A Yes. I was at the time -- yes, I had been officially appointed as a supervisor by December of '72. You see, I was in an acting capacity during the months of that year, 1972, and I believe I was officially appointed a supervisor in '72.

Q Have you been asked to be a witness in the Leonard case, Mr. Alleva?

A Asked to be a witness? The only thing I received was a letter from your office -- from Mr. Kostelanetz' office.

Q Have you been asked by Mr. MacDonald to be a witness in this case?

A Not as yet,no.

Q One last question. Mr. MacDonald asks questions about a possible, a possibility of a Swiss bank in the name of Mr. --

MR. MAC DONALD: You don't have to answer the question even when he finishes it if it has to do with the subject of Swiss banks. Mr. Tique knows he can go to the Court for whatever relief he needs. You don'tneed to ask that question any more.

Q Other than the memorandum of conference

on December 12, 1972, did you generate any other documents in connection with the Leonard case?

A You are talking about memorandums of interview?

Q Any kind of documents. I guess if you make a telephone conversation, you make a note of it and type it up normally?

A Yes, I may have, yes.

Q Whatever documents you did generate were transferred to Mr. Schulman when you reassigned the case, right?

A Yes, sir.

MR. TIGUE: Thank you very much, Mr. Alleva, I have no further questions.

MR. MAC DONALD: Thank you.

Subscribed and sworn to before me

this ___day of_____, 1975.

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N O R M A N L E V Y, called as a witness, being first duly sworn, testified as follows:

EXAMINATION BY

MR. TIGUE:

Q Mr. Levy, you know that I am the attorney for Jackson Leonard, do you not?

A I have been told that, yes.

Q You are a special agent with the Internal Revenue Service?

A Yes.

Q How long have you been a special agent, sir?

A Over 20 years.

Q Did there come a time when you were assigned to the Leonard case?

A Yes.

Q When was that, please?

A I think it was about May or June of '71, if I recall correctly.

MR. MAC DONALD: I will show you document 2493 and ask if that helps your recollection as to when you were assigned the case?

THE WITNESS: 9/1/70. I thought it was right

after I got back from the hospital on something. I am wrong. I didn't look at any of this before.

Q Was that document you looked at your chronological activity report?

A Yes.

Q In September of 1970 or thereabouts, did you have conversations with Mr. Singer, Mr. Bernard Singer?

A I would say yes.

Q He was the revenue agent on the Leonard case, right?

A I don't recall whether he was the revenue agent on it or --

MR. MAC DONALD: Let me interject and just say you don't need to answer the question. You can answer the question with respect to conversations and in what capacity or something that he could have and did ask Singer.

Q Who was the revenue agent on the case in September 1970?

A Let me look at this.

The work sheet indicates Bernard Singer.

Q At that time did you read a fraud referral report?

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MR. MAC DONALD: Don't bother answering the question, even by a nod of the head. A ground rule is that internal communications between agents is an area which Mr. Tigue is not entitled to inquire into and not entitled to ask questions and he need not ask them for purposes of this deposition.

MR. TIGUE: I don't agree that those are the ground rules at all. For the moment Mr. MacDonald has directed you not to answer. You don't have to answer if he says no.

Q When is the first time, if ever, you spoke to Jackson Leonard?

A I have to refresh my memory from my chronological for that.

Q Would you please do that.

MR.TIGUE: I would like to take a look at that, Mr. MacDonald, if I can.

MR. MAC DONALD: If it becomes appropriate under the rules that permit you access, of course, you will get a copy in accordance with our obligation.

MR. TIGUE: I mean like right now.

MR. MAC DONALD: Right now I only have one copy and I am not looking at it and I would like to see what it is he is reading.

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MR. TIGUE: I can look over his shoulder.

A June 16, 1971.

Q That was the first time you ever spoke to Mr. Leonard?

A Yes.

MR. MAC DONALD: By that you mean face-to-face as opposed to possible telephone calls to arrange for an interview?

Q The first time you discussed anything of substance other than arranging for appointments and that kind of thing?

A That is correct.

Q What about Mr. Edward Leskowicz, his accountant

A He was also present.

Q When was the first time you ever spoke to Mr. Leskowicz?

A I would say also on June 16th.

Q And the -- on that June 16th you had an interview with both of those gentlemen present?

A Yes.

Q Did you take notes at the meeting?

A Yes.

Q Where are those notes today, sir?

MR. MAC DONALD: You are really not entitled

to an answer to that question either. You are entitled to his report, the written manifestation and you have already been provided with a written copy of that report.

Insofar as those notes are concerned, you have received them. If there are additional notes in existence, I'll undertake to supply you with them.

MR. TIGUE: He has it before him, does he not, the handwritten report?

MR. MAC DONALD: I put before him the June 16th report, a copy of which I gave you some weeks ago.

Q That report was not written at the meeting, was it?

A No.

Q At the meeting you took notes?

A Correct.

Q Where are the notes, that is the question?

MR. MAC DONALD: You don't have to answer the question.

Q Did you destroy the notes?

MR. MAC DONALD: You don't have to answer the question.

Q Did you leave the notes in the file?

MR. MAC DONALD: You don't have to answer that question.

Q How long were you assigned to the Leonard case?

A Until or about September 3, 1971.

Q Now, you had an interview in July as well of 1971, did you not, with Mr. Leonard and Mr. Leskowicz?

A Yes.

Q I would ask all the same questions with respect to that and I assume the answers would be the same, that is, with respect to the notes, is that right, Mr. MacDonald?

MR. MACDONALD: Right.

Q Tell me what you did from the time you were assigned the case until the time you reassigned it to Mr. Schulman.

Was the case assigned to Mr. Schulman?

A No, I don't believe it was assigned from me to Mr. Schulman.

Q Who was it assigned to, sir?

A John Alleva.

Q And that was in September of 1971?

A Correct.

Revenue Service?

MR. MAC DONALD: The same.

MR. TIGUE: Do you want to state the grounds on that? You don't have to.

MR. MAC DONALD: I don't understand why you are probing into it. I don't think it was disputed that the taxpayer received the funds from Union Carbide and whether or not we investigated other sources of income is something that is not yet relevant.

MR. TIGUE: I don't think that Mr. Leonard has admitted anything. There has been an indictment, he pled not guilty and the Government is put to its proof on every issue on the indictment.

MR. MAC DONALD: You better see the Judge on that score as well.

Q Other than those two meetings, the one in June and the one in July 1971, have you ever spoken to Mr. Leonard?

A Not to my recollection.

Q The same question with respect to Mr. Leskowicz?

A I really don't recall.

Q You have no recollection of any conversation other than those two at the moment?

A Yes, sir, that is correct.

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Q Tell me what you did during the course of the investigation, from the time it was assigned to you until the time you reassigned.

MR. MAC DONALD: Aside from internal workings, you are asking for external contacts --

MR. TIGUE: Start that way. Obviously I will ask the broader question later.

MR. MAC DONALD: I really don't think you are entitled to probe the investigative processes, although you are probably well familiar with them. If you have some specific investigation in mind, I will be happy to consider it.

Q Number one, what conversation did you have with your fellow IRS employees?

MR. MAC DONALD: You can't answer that one.

Q In addition to that, what outside work did you do on the Leonard case?

MR. MAC DONALD: I really don't think there is a need for you to answer that question either.

Q Did you contact any banks?

MR. MAC DONALD: Don't answer that.

Q Did you contact any brokerage firm?

MR. MAC DONALD: Don't answer.

Q Did you interview anybody outside the Intern-

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Q Mr. MacDonald asks questions of prospective wit nesses relating to the possibility of a Swiss bank account of Mr. Leonard's.

Do you know anything about the existence or non-existence of such an account?

MR. MAC DONALD: You don't have to answer that question.

Q Going back to the June 16th meeting, who else present besides Mr. Leonard and Mr. Leskowicz and yourself?

A Revenue Agent Joe Tragna.

Q What about the July meeting of '71, who else was present --

A I believe the same.

Q Did Mr. Tragna take notes at those meetings as well?

A I believe he did but I don't really recall.

MR. MAC DONALD: The witness should know this, we produced a set of, for Mr. Tigue, a set of notes which purport to be notes of the meeting, Tragna's notes of those two meetings.

MR. TIGUE: Yes, I do have some notes that purport to be of that meeting.

Q Mr. Levy, have you been asked to be a

witness in the Leonard case?

A I say yes. I have been called down here so it must be for that purpose.

Q Have you been asked to leave your time open next week so you may testify in behalf of the Government?

A I'm trying to think if I was or not. I don't really believe I was asked to leave time open next week. I was advised that the trial was supposed to start and that was all.

MR. MAC DONALD: And you better leave some time open.

THE WITNESS: I have. When you put it the way you did, I wasn't going to say -- I don't believe I was actually notified.

Q Prior to -- did you discuss -- prior to June of '71, did you discuss the Leonard case with any other agents other than Mr. Singer?

MR. MAC DONALD: That just leads to the next question about what the discussions were and it really doesn't add anything to what you receive from the witness. In the absence of -- idle discussion in the office before he was assigned the case?

MR. TIGUE: Any discussions about Jackson Leonard prior to June 16th. Were there any such

discussions?

A With who?

Q With IRS people.

A There must have been.

Q That's what I say. In addition to Mr. Singer, who did you have such discussion with?

MR. MAC DONALD: Don't bother asking it. There are no doubt numerous internal discussions.

MR. TIGUE: Let him say that. If you want to object to the substance of the question, wait until I answer the question.

MR. MAC DONALD: Why take up time even identifying people.

MR. TIGUE: There is a very good reason why. It may help me to lead me to other witnesses which may help me defend Mr. Leonard. They may not abide by your advice.

MR. MAC DONALD: What is your best recollection of the persons within the IRS who you spoke to --

THE WITNESS: About this case?

MR. MACDONALD: That's right.

THE WITNESS: I would say -- you had Bernie Singer. Joe Tragna. And my supervisor.

Q Can you tell me why nine months passed from the time you were assigned to the case until the time you spoke with the taxpayer or his representative?

MR. MAC DONALD: That's a disguised question. It is the same question as before, what did you do during that period with respect to internal affairs or other investigations and it really doesn't need to be answered.

Q Is that right, you would have to describe --

A I would have to go into my diary to give you the answer to that.

Q Well, it just seems to me there is a long time between the time you are assigned until the time you spoke to him.

MR. MAC DONALD: Don't bother answering.

Were you out sick?

THE WITNESS: I was out sick for a period of at least six weeks.

Q Did you supply your diary to Mr. MacDonald?

A No.

MR. MAC DONALD: Would you bring your diary over when you come?

THE WITNESS: Yes.

MR. TIGUE: All revenue agents are required

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to keep their own separate diary in addition to their chronological work sheets.

MR. MAC DONALD: Is that a fact, that you keep a bound book of some kind?

THE WITNESS: Mr. Tigue and Mr. Kostelanetz and Mr. Ritholz know that very, very well.

MR. MAC DONALD: Could you send that over today when you go back?

THE WITNESS: I can try. Offhand I'm not sure that they are all in the office. Some of them may be in the federal records center -- I mean the early years. I mean the last two years I know are in the office.

MR. TIGUE: I wouldn't want to delay the trial because of any 3500 material that is not available but I did warn Mr. MacDonald --

MR. MAC DONALD: Let me ask a question. Is it true that in your diary you make -- withdrawn.

Q There is no secret about it. In the diary you are required to make some record of what you do on a particular day, is that right?

MR. MAC DONALD: Don't bother confirming what IRS requirements are.

Q Did you recommend that Mr. Leonard be

lzrf 20 Levy

prosecuted?

A No, I didn't.

MR. MAC DONALD: Don't answer.

MR.TIGUE: Why shouldn't he answer that question.

MR. MAC DONALD: His recommendation is also an internal agent judgment and the way it is arrived at is probably well known to you. Why ask an agent to tell you what he included in his report to his superiors.

MR. TIGUE: If somebody suggests somebody be prosecuted, I think it would go to his bias or interest in connection with his testimony. If he is going to be a prospective witness, I think I should know.

MR. MAC DONALD: Maybe the grand jury has a say in the process.

Q Mr. Levy, is it your judgment that you do not want to answer the questions Mr. MacDonald has told you not to answer or are you not willing to accept his judgment?

MR. MAC DONALD: You don't have to answer that question. It is an inappropriate question to ask at this stage for internal communications whether they are in the form of recommendations or reports, oral or written. There will come a time when you are

entitled to such matters and I'm recommending to the agent that he not do anything in violation of the requirements of the law governing that time.

MR. TIGUE: I am not suggesting there is anything to violate the law. It seems to me if he had a conversation with someone, it doesn't violate the law if he tells me what that conversation was.

You have directed him not to answer numerous questions.

MR. MAC DONALD: I suggest maybe you should see Judge Owen --

MR. TIGUE: I am suggesting perhaps maybe Mr. Levy would like to answer those questions irrespective of your direction because he sort of blurted out the answers to many questions.

MR. MAC DONALD: That is simply because we are all trying to get out of here and get to other business.

MR. TIGUE: Under the circumstances I don't have any more questions of you, Mr. Levy, although I regard the interview as entirely incomplete but you have to do what Mr. MacDonald tells you to. Thank you.

Subscribed and sworn to before me
this ____ day of _____, 1975.

ROBERT SCHULMAN called as a witness, being first duly sworn, testified as follows:

EXAMINATION BY

MR. TIGUE:

Q Mr. Schulman, you know that my name is Jack Tigue and I am the attorney for Jackson Leonard.

A Yes, sir.

Q Did there come a time when you were assigned to the Leonard investigation?

A Yes, sir.

Q Would you tell me when that was, please?

MR. TIGUE: I would like to note the time. It is 1:30.

A I think it was April of 1972.

Q Who was your predecessor on the case?

A Special Agent John Alleva.

Q The case is still assigned to you, is it not?

A It is not assigned to me. It is within the jurisdiction of the Department of Justice.

Q But I mean, it was never assigned from you to another special agent?

A I was the final agent in the Internal Revenue Service at the district level who had the case.

Q Now, Mr. Schulman, have you been asked to be a witness at the Leonard trial by Mr. MacDonald?

A I was told that I might be asked to testify.

Q When is the first time you ever met Jackson Leonard?

A In May of 1972.

Q Could you tell me how that came about?

MR. MAC DONALD: Is it pursuant to an appointment, is that what you mean?

Q Who did you call, who did you talk to? Would that be May 4, 1972?

A Probably. If I could look at the first of my memorandums of conference with the taxpayer, I can tell you definitely.

Yes, that was on May 4th.

Q And Mr. Leskowicz was there?

A Yes, he was.

Q Had you ever spoken to Mr. Leskowicz prior to that date, except to set up an appointment or something of the sort?

A No.

Q This was your first discussion of any substance with either Mr. Leskowicz or Mr. Leonard, is that correct?

lzrf 3 Schulman

A Correct.

Q When the case was assigned to you, did you review the files prior to your interview with Mr. Leonard?

A Yes, I did.

Q When you spoke with Mr. Leonard on May 4th, did you take notes during the course of that meeting?

A Yes, I did.

Q Did Mr. Reiner take notes of that meeting as well?

A I don't recall.

Q Did Revenue Agent Tragna take any notes?

A I can't recall.

Q Could you tell us where those notes are today, sir?

MR. MAC DONALD: Don't answer the question. We will undertake to supply you with an answer as soon as we have had a chance to determine --

MR. TIGUE: What it is?

MR. MAC DONALD: What that answer is, yes.

Q You also had a meeting on May 4, 1972 with Mr. Leskowicz without Mr. Leonard being present, is that correct?

lzrf 4 Schulman

A Well, the meeting was a continual meeting, so to speak. However, Mr. Leonard wasn't present until later in the conference.

Q 12:45, to be precise?

A Yes.

Q And there was a further interview of Mr. Leonard in July of 1972, is that right, sir?

A Yes.

Q And you also had a meeting -- withdrawn -- other than those two occasions, have you ever spoken to Mr. Leonard?

A No, I have not.

Q Other than those two occasions -- strike that-- on the May 4th meeting Mr. Leskowicz was present. Did you ever have any discussions with Mr. Leskowicz other than the May 4th meeting?

A I can't recall specifically but if I did, it was --

MR. MAC DONALD: Don't bother speculating.

THE WITNESS: I can't recall.

MR. TIGUE: I'm just trying to block out the -- the only memorandum of conference I have where Leskowicz was ever present was the one with Leonard and the one by himself on May 4th and those are the

lzrf 5 Schulman

only two memorandums of conference that the Government has --

MR. MAC DONALD: On --

MR.TIGUE: On Leskowicz. As far as I know --

MR. MAC DONALD: I don't recall having read any other memorandum of conference between Schulman and Leskowicz than the ones we provided you.

Q The others may just constitute telephone conversations where you would make a note and put it in the file?

A Or not even make a note.

Q I just want to make sure there are no other memoranda of conference.

Other than that meeting, those two meetings of May 4th and trivial telephone conversations, have you ever had any other discussions with Mr. Leskowicz?

A No.

Q Does that include right up to the present time, that is, the trial preparation?

A Correct.

Q You have not been present at any discussions where Mr. Leskowicz was present?

A No.

Q Can you tell me what you did on the

investigation from May 1972 up until the time it was referred to the Regional Council's office?

MR. MAC DONALD: Mr. Tigue doesn't really want, I don't think, generalities about the work typical of such investigations. He wants the details of your internal agency investigative techniques and affairs and communications and I told him with the previous witnesses he is not entitled to such matters.

With respect to external contacts, of course, there were witnesses that you contacted and he understands there will be an appropriate disclosure in accordance with the rules as to those witnesses.

MR.TIGUE: I want an answer to my question. I don't want to hear all the lawyer talk. Are you directing him not to answer?

MR. MAC DONALD: Except as I have outlined. If you have some specific area that you want to ask about, I'll consider the narrow specific question but the broad description of investigative techniques is something that you are not entitled to.

MR. TIGUE: Let me take them one by one.

Q Did you talk to anybody at Union Carbide?

A During the course of the investigation?

Q Yes.

lzrf 7 Schulman

A Yes, I did.

Q When was the first time?

MR. MAC DONALD: You don't have to go into details of the talks. There is an appropriate disclosure rule concerning those communications and Mr. Tigue will get that at the appropriate time unless Judge Owen orders it sooner.

MR. TIGUE: You just tell him not to answer the question, all right?

MR. MAC DONALD: There is a reason for this record being made and you and I have agreed on that reason and the jury is going to hear the record, not counsel's characterization of it. If you want to make --

MR. TIGUE: You are telling him not to answer. That is all I want to know.

MR. MAC DONALD: I am telling you to go to Judge Owen if you want to establish your entitlement to an answer.

MR. TIGUE: For the moment I have asked him a question and you have told him not to answer. That's all I am trying to get on the record.

MR. MAC DONALD: If you intend to ask Mr. Schulman in front of the jury if he was told not to

answer a question, I am going to dispute the accuracy of that characterization. This record is being made for the purpose of precision in the jury's learning what took place and why it was that you were given the answers you were given.

Q Do you intend to answer the question?

MR. MAC DONALD: You don't have to engage in colloquy with Mr. Tigue, Mr. Schulman.

MR. TIGUE: Are you telling him not to answer?

MR. MAC DONALD: I have stated the reasons why you are not entitled to an answer. If you disagree, you can go to Judge Owen.

MR. TIGUE: If you are going to be here being his lawyer, you have to tell him to answer or not to answer.

MR. MAC DONALD: I have to make a statement of why it is you are not entitled to the information you are trying to elicit.

MR. TIGUE: I thank you for the advice. Now may I have an answer to the question?

MR. MAC DONALD: You don't have to bother engaging in colloquy with Mr. Tigue.

MR. TIGUE: I don't want colloquy. I want an answer.

MR. MAC DONALD: Why don't you move on.

MR. TIGUE: We have to have a record where either you tell him not to answer or to answer. You can't make a speech. You have to tell him to answer the question or not to answer the question.

MR. MAC DONALD: I have asked from you more precise questions of --

MR. TIGUE: I have asked him if he talked to anyone at UCC. The answer was yes. The question is now, when for the first time.

MR. MAC DONALD: Answer the question.

A I don't recall the date.

Q Was it before the May 4th meeting with Mr. Leonard?

A No.

Q Was it before the July meeting with Mr.

Leonard?

MR. MAC DONALD: His question is does it refresh your recollection to have you focus on either of those two meetings?

A I can't recall.

Q Did you obtain a copy of the UCC contract, which is the subject of count 3 of the indictment?

MR. MAC DONALD: You are asking for specific items of information solicited from --

MR. TIGUE: You told me not to be general. I am being specific.

MR. MAC DONALD: And whether or not there was a copy in the files of the government is a question that you are not entitled to an answer to.

Q At the May meeting with Mr. Leonard or Mr. Leskowicz did you exhibit a copy of the contract?

A No.

Q Did you do that in July of '72?

A No.

Q Did you have it in your possession at that time?

MR. MAC DONALD: That's the same ques-

tion. That's an inappropriate question.

Q In December, 1972 you had a meeting with Mr. Leskowicz, is that correct? With Mr. Alleva in '72? That was the meeting with Mr. Alleva, yourself and Mr. Lefkowitz, the attorney?

A Yes, I did.

Q Did you exhibit a copy of the contract to Mr. Lefkowitz?

A No.

Q Did you have it in your possession?

MR. MAC DONALD: The same question.

MR. TIGUE: I don't understand.

MR. MAC DONALD: You are once again asking for the state of information within the files and it is just a different way of approaching successively the forbidden area.

Q Did you ever exhibit the contract to Mr. Lefkowitz, Mr. Leskowicz or Mr. Leonard?

A No.

Q Do you know if anybody else in the Internal Revenue Service ever did?

MR. MAC DONALD: That's asking you for internal information and it is really not an appropriate area of inquiry. I don't know why you

are pressing the matter. What he knows other agents may have done in their dealings with Mr. Lefkowitz -- you should have asked the other agents who you have had a chance to interview.

MR. TIGUE: I am asking the questions I think appropriate. I think this is appropriate from Mr. Schulman. If you don't tell him not to answer and let's move on.

MR. MAC DONALD: The instructions will stand.

MR. TIGUE: What was the instruction. I missed it.

MR. MAC DONALD: So have I. I have forgotten. I think you have asked for what other agents may have told Mr. Schulman and that's not appropriate.

Q With respect to the May 4, 1972 meeting where Mr. Leonard was present, could you tell me everything you recollect that took place at the meeting?

A There were several items that were questionable which I had reason to believe might warrant further inquiry and those items or areas were what I took up or questioned Mr. Leonard about at that

time.

May I refresh my recollection?

Q Sure. They were three major items or major categories. The first one involving some $12,000 in checks in the year 1966 received by Mr. Leonard from Union Carbide.

The second major item involved some stock received by Mr. Leonard of a Canadian chmeical firm named Chinook Chemical Corporation.

Can I give the details of what I asked and what answers I gave?

MR. MAC DONALD: Why don't you finish the major items --

A The third major item -- let me correct myself. In reviewing this there were four major items. Going back, the third major item involved possible unreported income received by Mr. Leonard from a Japanese chemical firm, and the fourth major item involved possible unreported income received by Mr. Leonard during 1967 and 1968 from Union Carbide.

Q Let me ask you in general, do you have a recollection of anything that was discussed beyond what's contained in your memorandum of

conference?

A Not specifically.

Q Generally?

A Yes.

Q Can you tell us what in addition was stated other than what's in the memorandum of conference?

A Certain questions posed by the revenue agents who were present relative to information and records requested during the course of their audit up to that time relating to these items.

Q Anything else?

A Not specifically to the -- I'm sorry. I remember specifically asking Mr. Leonard about some alleged unreported income received from Union Carbide in 1966 -- in 1967 and 1968, and the circumstances are what appeared odd to me in his attempt to make reply to my questions relating to that alleged unreported income.

Q Those are matters which are not included in your memorandum?

A That's correct.

Q Can you tell me why they were excluded?

A They were my interpretation of actions

rather than actual facts or statements made by Mr. Leonard.

Q Can you tell me what those were?

A I asked Mr. Leonard directly or suggested to him that the government appears to have information or I appear to come across information relative to some 10 per cent being received by him based on subcontractors' costs on a Union Carbide contract which doesn't appear to have been reported by him. And my impression was that he seemed rather surprised at the question as was Mr. Leskowicz, although it was just my interpretation of their physical response. Within a short period, perhaps a minute or two, they requested that we break for lunch.

MR. MAC DONALD: Can I ask you to elaborate by giving us your best recollection of, for example, Leonard's physical appearance at that time?

THE WITNESS: His physical appearance? The best description I can give to it was one of slight surprise.

MR. MAC DONALD: Did his jaw drop or did his coloring change?

THE WITNESS: I didn't recognize any change in color. Sort of a little rise, he looked up or caught himself. There is various descriptions but to some degree a little startled or surprised is the best I can describe my interpretation of what occurred after asking that question or series of questions.

Q I notice in the last line in the statement it says that the revenue agent stayed behind to begin the audit of 1968, is that right?

A I believe it was a '68 audit. However, they did remain behind to deal with Mr. Leskowicz and continue their audit, which was in progress both before this meeting and at subsequent visits by the revenue agent or agents.

Q But this was the beginning of the '68 audit?

A I don't know.

MR. MAC DONALD: We will adjourn until some point tomorrow morning when we can agree that we have enough people to make it worth while for Mr. Tigue to come back up here.

MR. TIGUE: I will come back for anybody.

(Adjourned to January 3, 1974.)

Subscribed and sworn to before me

this day of , 1975.

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

I, LEON ZUCK, a Certifies Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JERRY SUSSMAN, BERNARD M. SINGER, JOHN ALLEVA, NORMAN A. LEVY, and ROBERT SCHULMAN, the witnesses whose deposition is hereinbefore set forth, were duly sworn by me and that such deposition is a true record of the testimony given by such witnesses.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of January 2nd, 1975.

Leon Zuck

FOR CONTINUATION OF INTERVIEW OF ROBERT SCHULMAN

SEE PP. 211a to 250a

C E R T I F I C A T E

STATE OF NEW YORK)
)ss
COUNTY OF NEW YORK)

I, LEON ZUCK, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JOSEPH J. TRAGNA and ROBERT SCHULMAN, the witnesses whose depositions are hereinbefore set forth, were duly sworn by me, and that this transcript of such depositions is a true record of the testimony given by said witnesses.

I further certify that I am not related to any of the parties to this action, by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day January, 1975.

mpe

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

-against- : 74 Cr. 599

JACKSON D. LEONARD, :

Defendant. :

January 13, 1975
10:00 a.m.

BEFORE:

HON. RICHARD OWEN,

District Judge.
And a jury.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York
BY: W. CULLEN MAC DONALD, ESQ.
Assistant United States Attorney

Messrs. KOSTELANETZ & RITHOLZ,
Attorneys for Defendant
BY: JOHN J. TIGUE, JR., ESQ.,
of Counsel.

(In the robing room.)

THE COURT: Now, we have objections to certain defendant's voir dire. This is all discretionary, so if you will keep that in mind --

MR. MAC DONALD: Page 4, question 8, the second sentence.

THE COURT: I'm not going to give that second sentence. Ask whether or not the jury would treat any such witness differently than it would treat any other witness --

MR. MAC DONALD: Page 5, question 17. We feel that's covered by generic question, page 7, number 32. To specify these individuals to begin to give the complicated defense, too many agents and not enough substance to their findings.

There is a generic question --

MR. TIGUE: May I comment on that?

If there is a response "yes" to this question, then of course the Court can inquire further whether it is an IRS employee or other, but I don't even recognize some of these names, for example.

MR. TIGUE: May I respond, your Honor? I think it is important, because at least it is my firm belief that, minimum, three of those agents will testify, Mr. Laski,

Mr. Reiner and Mr. Tragna, and I think these people live in New York, and I would like to have the jury not suddenly find out that they know them. It is a question of credibility of these agents, and I think it's fair --

MR. MAC DONALD: We have no objection to those three agents --

MR. TIGUE: I might delete some of the collection agents in this case, because I don't think they are going to testify. Mr. MacDonald is going to present this, and I have a right to find out if the jurors know them. Some of them aren't law enforcement officials.

THE COURT: Suppose I were to try to steer in between your positions by identifying Laski, Reiner and Tragna as agents.

MR. MAC DONALD: Revenue agent auditers. And just ask whether the other people are known by name, without identifying their employment. I will do that.

MR. TIGUE: Thank you, your Honor.

THE COURT: Revenue agent auditers?

MR. MAC DONALD: Finally.

Judge, on page 9, sub-part 48.

THE COURT: I'm not giving 48 in this form, so don't concern yourselves with that.

MR. MAC DONALD: That's all we have in the way

of objections to the voir dire.

MR. TIGUE: If your Honor will just give me one minute --

THE COURT: Surely.

MR. TIGUE: With respect to the Government's requests, your Honor, on page 4, I'm number 12, --

THE COURT: Well, I'm not going to give 12 in that form.

What I am going to ask is, roughly, 5 through 11 and 13, and the balance will come in in one way or another in my standard voir dire questions.

MR. TIGUE: Thank you.

You have something about my opening statement?

MR. MAC DONALD: Yes. I anticipate that Mr. Tigue may attempt to insert as an issue for the jurors' consideration, the propriety of the Government's employment of a mail watch on Mr. Leonard's mail. It's our position, since this arose late last night, that we have only located a single District Court opinion, and I have it outside, that once the Court has made a determination concerning the legality of the methods employed in obtaining the evidence that it is not a matter for the jury's determination any longer.

There is an additional statement in this regard

that I should tell the Court.

In Laski's deposition -- I think your Honor has a copy of that -- Mr. Laski said he had no firsthand Laski knowledge in any event as to the methods that were employed to obtain the evidence, and I tell the Court there is no witness the Government intends to use in its case in chief who has firsthand knowledge, and accordingly, I don't believe it can be hoped in the absence of the defendant calling in his case witnesses with first hand knowledge --

THE COURT: These are the things Mr. Morris says he observed.

MR. MAC DONALD: Yes, sir. While it may be true that Mr. Laski was a member of an elite group -- I am giving Mr. Tigue that argument -- he can identify Mr. Laski as such as being a trained CPA and a lawyer. The factual underpinnings concerning the selection of that group and its members, is not something he can give testimony on. If it is going to be an issue in the case in the openings, each of us has to address ourselves to it, and we would ask in the absence of some authority showing that the jury has a right to get involved in the methods of evidence collection. The matter is not one that I am going to offer testimony on and I don't believe is one that any testimony can come in in the case in chief.

THE COURT: Maybe we are talking about something that's not going to happen.

MR. TIGUE: Well, your Honor, I am waiting to see what Mr. MacDonald says in his opening statement and what Mr. Laski says in his direct evidence. Mr. Laski wasn't a member of an elite group. He later became a coordinator of this effort, and he does have competent knowledge how this information was collected. If the day he walks into Jack Leonard's office he has in mind that he's part of this group, that there is a Swiss bank account, that he has a motive from the very beginning to make a criminal tax case here, I believe I have a right to show what knowledge he had or didn't have.

Furthermore, I don't believe I am bound by his casual answer, because it wasn't pursued and some of the questions weren't permitted to be answered in this regard, that maybe he didn't sit over there and examine the letters himself, but if he was an integral part of the entire program, I believe I have a right to probe into it on cross examination if I choose. I want to hear what he says to us.

THE COURT: In other words, you aren't going to get into the opening, in any event?

MR. TIGUE: Well, it depends on what Mr. MacDonald

says.

THE COURT: Mr. MacDonald is going to say nothing, so the first time this can possible arise is in your cross examination of Mr. Laske.

MR. TIGUE: I suppose that's correct, your Honor.

THE COURT: All right. We will cross that bridge when we come to it. I will make a note of that as a question that may be before us at some point.

MR. TIGUE: I may be calling Mr. Morris as my witness in the case.

THE COURT: All right. We will meet that issue.

MR. TIGUE: I have a very serious matter, your Honor.

I intended originally, when the clerk says, "Is the Government ready," and Mr. MacDonald says, "Yes," I was going to say I am not ready, based on something that happened Friday.

On Friday afternoon, Mr. MacDonald delivered to someone from my office, about a quarter of a million dollars in checks -- checks, not the cash itself -- checks which were paid by the Chase Manhattan Bank made payable to Jackson Leonard, and then I spoke to Mr. MacDonald yesterday --

MR. MAC DONALD: This is the Court's copy of

the exhibits and the lists and that's the one Mr. Tigue is referring to.

THE COURT: All right.

MR. TIGUE: There is another check for $125,000 so we are now up to $383,000, which Mr. MacDonald intends to prove came from a Swiss bank account.

This is part of the similar account application I made last Tuesday, your Honor, that I am in no position to defend that charge.

I invited Mr. MacDonald to give some particulars and your Honor ordered him to do so and they came on the eve of trial. I think that checks, which are six or seven times or eight times as much as is charged in the indictment, is about as much from left field as you can imagine, as your Honor spoke about coming from left field.

I think the prejudice in these checks far outweighs the probative value that they have.

I submit the Government is attempting to introduce them merely to inflame the jury that Mr. Leonard received many checks during 1968.

I believe he will not be able to establish or even to allege that these checks constituted income.

I don't know what other records there are. The only records I have from Chase Manhattan Bank -- I don't know

if it can be established that there were additional records which would establish that these checks came from Switzerland or a Swiss Bank or where they came from.

MR. MAC DONALD: I should tell Mr. Tigue for his benefit, that the missing check for $138,000, which is due to be delivered here in a moment by the Chase Manhattan officer, I am told has a carbon memo such as we have attached there, which recites Banque Continentale de Zurich of those funds. Banque Continentale, which we believe is a misspelling for Banque Cantonale de Zurich, and thus the exhibit, as completed in a few minutes, will contain such an instrument.

THE COURT: Let me ask you, Mr. MacDonald -- let the record show I am deliberately not asking Mr. Tigue -- is it the Government's intention that it will somehow demonstrate that the signature on the reverse of these exhibits is in fact his signature?

MR. MAC DONALD: Yes. We will demonstrate that the funds were used by Mr. Leonard to pay down his loans with the bank and in addition, to build a house and not filtered into the ordinary bank account. We don't have a handwriting expert but we don't think there will be any problem of tracing it into his hands.

THE COURT: Well, Mr. Tigue, these are checks

that are financial transactions within the period involved?

MR. TIGUE: Your Honor, there is no charge in the indictment about these checks. There is no bill of particulars. The Government began its investigation six years ago, and I submit it is grossly unfair on the eve of trial to be confronted with an additional amount six times the amount charged in the indictment as to which I had not the slightest warning.

This is precisely what I warned the Court was coming, that there would be a problem defending Mr. Leonard on these alleged similar acts. I don't believe that the Government has one ounce of proof that this is income, your Honor, nor that it came from a Swiss bank account in the name of Jackson Leonard.

I don't think it proves anything, your Honor, and it is so highly prejudicial -- it is a classic case --

THE COURT: Mr. Tigue, let me stop you.

I think you are arguing something to me today that you ought be arguing to me on Wednesday, when I have had delineated for me what these checks are here to show, what the overall financial picture is, and at that time we have a number of oppositions open. I can exclude it if you are correct--I have that discretion--but at this point I am certainly not going to give you a continuance based on

this, unless Mr. MacDonald were to join in the request for the continuance.

MR. MAC DONALD: I assume if there are records which exist which we deal with, that Mr. Tigue can certainly inform himself about them between now and Wednesday.

THE COURT: And it would seem to me that this preparing to defend -- this is the year 1968 -- you would have reviewed all of his financial transactions, of every nature, shape and form, and in the course of that review, would have acquainted yourself with these particular checks and then be prepared to deal with them if indeed they needed to be dealt with. Maybe they don't. But I think we are premature on that and I deny the request for a continuance.

MR. TIGUE: On the contrary, your Honor. I spent my time in the last month or so preparing to defend him on the charges contained in the indictment, not something which comes from leftfield like this. I mean, it may require a trip to Switzerland to see where these checks came from.

I think I have an obligation to Mr. Leonard to attempt to rebut those and I think in the next 48 hours, I will have my hands full cross examining the Government witnesses, and I don't have time to prepare a defense to

whatever that is. It is something that the Government may mention in its opening statement. That's the reason I bring it to the Court's attention now.

I have ths ame argument with respect to the false affidavit. Theres a charge here that the Government intends to make that he submitted a false affidavit. I submit, your Honor, that is irrelevant to the charge in the indictment. He is not charged with it. The Government could have indicted him for that if there was any evidence that there was a false affidavit and my application is to instruct the Assistant U. S. Attorney not to mention that affidavit in his opening statement and not to mention those checks in his opening statement.

THE COURT: Aren't the false exculpatory statements inadmissible in any kind of a case, and if the Government fails in demonstrating the statement is false and exculpatory, then they have fallen on their face and that's the end of it.

MR. TIGUE: I don't think it is the end of it, your Honor. It is guilt by association, where they sort of say, "Question, Do you have a Swiss Bank Account?"

My client submits an affidavit that says No, and they don't prove it --

THE COURT: Let's cross that bridge when we come

to it. I have ruled on the statements and that's ancient history at this point.

I will reserve decision. There is nothing before me, frankly, to rule on, and when 81 comes before us, we will take a stand on it at that point.

MR. MAC DONALD: We have some briefs with authorities in that area, Judge, and Mr. Tigue has copies of them.

MR. TIGUE: Is Mr. MacDonald going to mention them in his opening statement?

MR. MAC DONALD: I don't intend to do anything other than identify Mr. Leonard's affidavit in connection with the Swiss bank account, without stating how we will prove.

THE COURT: You were an acknowledgeable prosecutor, and you can govern yourselves according to the way you think the case is going?

MR. TIGUE: My motion for a continuance is denied?

THE COURT: Yes.

All right, gentlemen. I will be with you in two or three minutes.

MR. MAC DONALD: We have some 3500 material. Those papers are your exhibits, your Honor, with an exhibits list in front.

THE COURT: Thank you very much.

(In open court.)

(Jury panel present.)

MR. MAC DONALD: Government is ready.

MR. TIGUE: Defendant is ready, your Honor.

(Panel of prospective jurors was sworn.)

(Recess.)

AFTERNOON SESSION

2:00 p.m.

(A jury of 12 was duly selected and sworn.)

(Two alternate jurors were duly selected and sworn.)

(Recess.)

THE COURT: Gentlemen, before the jury comes in I want to put these things on the record here.

One of my law clerks, or both spoke to one or the other of counsel, and communicated on Friday --

MR. TIGUE: I spoke to Mr. Sudler on Friday.

THE COURT: I think it was Friday. I granted the Government's motion to quash the subpoena. I denied the application for a fourth hearing. I denied the motion to suppress the oral and written statements, and I deny the renewed motion to supress the proof of the mail watch, and in that connection, I will mark as Court's Exhibit 1, the letter that Mr. Tigue sent me dated January 9, which I treated as his notice of motion--

MR. TIGUE: Thank you.

THE COURT: -- in that respect.

xx (Court's Exhibit 1 marked for identification.)

THE COURT: Now, I want to say that with regard to the statements, I didn't find that the evidence

made out a sufficient showing to support fraud or misrepresentation, which was Mr. Tigue's "Trojan Horse" theory, and even assuming that the foreign bank project was planned and to some degree implemented jointly between audit and the intelligence divisions and even assuming that the subpoena would demonstrate that such a point participation emanated from high levels, I conclude that Agent Laski didn't have to give constitutional warnings under the press release, assuming again that I would follow the holding of the First, Fourth and Seventh Circuits in this case.

Agent Laski was an auditor, and his role was less centrally related than it was in the case of U.S. against Robson, 477 U.S. 13, Second Circuit, 1973, which I find controlling as far as I am concerned.

Further, I have strong doubts that in any event the Second Circuit would follow the First, Fourth and Seventh to the effect of the press release, for reasons expressed in United States against Rukshima, 27d Fed. Supp, District of Hawaii, in 1974.

For those reasons, the application is denied.

Now, I have had chance, Mr. MacDonald, to look through the two memos of law that you gave me this morning and just now, and I would suggest that we proceed a little cautiously in terms of the Government's opening in these

areas because I am not immediately so sure that there is necessarily a kind of conflict that is probative between the statements in the '71 and '72 returns that Mr. Leonard had no interest in or authority over foreign bank accounts, and your asserted conflict that he did maintain a banking relationship with the Swiss bank -- I don't think that one statement is necessarily conclusive of the other statement.

MR. MAC DONALD: I had intended no reference to the '71 and'72 statements, Judge. I had intended only to direct myself to the affidavits which spoke as of '69, '68 and '67, and the facts that the Government would offer proof to show that it was false.

THE COURT: Well, I have a memo here saying you intended to present evidence tending to show that during '71 and '72 --

MR. MAC DONALD: I still have that intention. I will make no delineation to the jury with regard to those additional false statements.

THE COURT: Well, I suggest that we proceed cautiously here because I am not convinced that the probative value of that is so strong that it permits it to be received, as against the possible prejudice inherent in it. But I will await further developments on the record.

Now, also, I gather, that with regard to the

$383,000 as to which you have submitted a memorandum, that will developed in the proof and not mentioned in the opening either?

MR. MAC DONALD: I will certainly be very careful, your Honor. I whispered to Mr. Stoltz, "Did we misunderstand one another?" I merely intended to say to the jury that Agent Laski had made oral inquiry of Mr. Leonard and been assured that there was no foreign banking other than a bank loan in Australia and later obtained an affidavit to that effect. And then I was going to contend at a later point in the opening, to say that Mr. Leonard had indeed a Swiss bank account from which he received hundreds of thousands of dollars, and I was going to be no more specific than those references.

I think, Judge, that I don't have any real -- well, I think that there are at least three independent bases of inadmissibility with respect to the Chase Manhattan Bank checks and the false affidavit or, in the Government's view, the false affidavit, and I would ask the Court to allow me to tell the jury that they can expect proof concerning his Swiss bank account.

True, we don't have a case that has a Swiss bank account involved, but I found no authority which even hints at the contrary proposition. We found cases where

affidavits and tax returns contradicted one another and we found cases of where the falsity of both have been proven.

The Swiss Bank mechanism is usually such that there is not the proof available.

THE COURT: Mr. MacDonald, I am not prepared to say what you have in mind to support the use of that proof, and I will at this point have to rely on your judgment that this is admissible, because short of having in effect an advance run of it, I can't make the kind of judgment that would be definitive.

MR. MAC DONALD: I just call the Court's attention to the Xeroxes of the final check, which your Honor didn't have this morning, and that contains a recitation of the Swiss bank and that contains the source of the $138,000 paid, in Mr. Leonard's affidavit. That's not all --

THE COURT: You are going to establish by additional evidence that the defendant was aware that this was the source?

MR. MAC DONALD: Yes, sir.

THE COURT: All right.

Mr. Tigue.

MR. TIGUE: Your Honor, I just want the record to be clear that I don't assent to any of this, and I want to make my position here.

Just one other thing. In my opening statement, which will follow Mr. MacDonald's, I have blown up the bare-boned statute in this case and I want to show this to the jury, to advise them the nature of the charges.

MR. MAC DONALD: I am sure it is the Court's province, and Mr. Tigue didn't intend to talk about the law. I am not sure why the statute would aid except as a demonstrative exhibit --

THE COURT: I gather Mr. Tigue is saying that "this is the statute on which my client is charged, and this is the language in which he is charged" and he wants the jury to take it in through the eye as well as the ear and for no other purpose.

For that purpose, during the opening statements, we will permit it to be exhibited.

All right, will you bring the jury in.

(Jury present.)

MR. MAC DONALD: May I proceed, your Honor?

THE COURT: You may proceed.

MR. MAC DONALD: May it please the Court, Madam Forelady, members of the jury:

This is a criminal case, in which Jackson Leonard, the defendant, is charged by the United States with having violated a statute which makes it a criminal offense

to wilfully make false statements on an income tax return.

The grand jury's indictment twice charges him in legal indictment language, with the making and ascribing to his tax return, Form 1040, which contained a verification that it was subject to penalties of perjury, knowing that the tax return contained a materially false statement.

In plain language, and simple language, he perjured himself by twice falsely understating his income in the 1967 and 1968 and the dollar amounts shown told us, approximately $24,000 in 1967 on reported income of a quarter of a million -- and 58,000 in 1968 on an income of 134,000.

Now, the evidence will come from the witness stand and from any exhibits received.

The evidence will show that in 1968 Revenue Agent Mortimer Laski was assigned to conduct an audit on Mr. Leonard's returns as filed. After a decision that Mr. Laski would be aided by Mr. Leonard's accountant instead of his attorney, he met with that accountant and began to look at the records which he requested, to examine the returns.

One of the first records he requested was the bank statement to which Mr. Leonard's business receipts were deposited, and at that time a single bank statement of the First National City Bank was presented, and it was

represented that that was the sole bank to which his business receipts went.

He examined the entries on the deposit side of that bank statement and next requested copies of the contracts with the various firms indicated, so that he could see the basis for the payments and that they were in order with the contract.

One of the contracts presented was with the Union Carbide Corporation. I will come to the payment provision later, but that contract provided that Mr. Leonard would supply the Union Carbide Corporation with package for the construction of a plant in Taft, Louisiana and a second plant in South Charleston, West Virginia, for the making of a certain kind of chemical.

Mr. Leonard had no objection to do the actual drawings from which the plant would be built, but those were to be subcontracted out to a New York firm of specialists called Treadwell Corporation.

Now, the payment provisions of the contract were in paragraph 3, and you will be hearing the paragraphs referred to frequently throughout this case. There were several kinds of payments. Lump sum payments, four of those, and then monthly payments.

The first two lump sum payments were a $50,000

payment on the signing of a contract or a few days thereafter, and a $130,000 payment once notice or go-ahead to proceed had been given.

These had been reported on Mr. Leonard's receipts in that bank statement. The last two lump sum payments weren't due for another year yet. They were going to be given on completion of the Taft plants, and performance in accordance with various chemical parameters that were set forth in the contract.

Mr. Leonard promised that it would make a certain type of chemical, and there was a test provision before the last payments were made, $150,000 for Taft, Louisiana, and $300,000 for the South Charleston, West Virginia plant.

Paragraph 3(c) was one of the two monthly provision payments. It required a fixed sum of $37,000 to be paid each month for ten months or a total of $370,000. 3(e) required a variable monthly payment in the amount of as the contract had originally been typed -- Union Carbide would pay Mr. Leonard whatever amounts he paid to that subcontractor Treadwell for Treadwell doing the drawings, plus a fee of 10 percent for Mr. Leonard's supervising the Treadwell Company in the preparation of the drawings.

That provision in the contract presented to Agent Laski had been altered and a hand-inked line had been

drawn through the last phrase "plus a fee of 10 percent to Mr. Leonard for his supervising the contracts."

Now, when Agent Laski compared the contract's promised payments against the bank statement, he discovered that with respect to the fixed monthly payment, the $37,000, the first three had been deposited in June and then in September, about the last four that should have been received in 1967 hadn't been deposited into that bank account.

Thus, there was a total of $291,000 in '67 which was received by Mr. Leonard insofar as his bank record indicated.

Mr. Laski, after conducting an audit of various accounts and various other items in the overall return, requested an opportunity to talk to Mr. Leonard. He did, and Mr. Leonard was accompanied by Mr. Leskowitz, the accountant.

At a meeting they discussed several subjects, one a $28,000 payment to a construction firm in Canada, a payment which Mr. Leonard said had been made in cash, and he couldn't show a check for that amount.

The next issue which was discussed and raised in that meetin was Agent Laski's inquiry concerning other bank and banking practices, including foreign banks.

Mr. Leonard identified an Australian bank having loaned him some money in connection with a plant that was being built there that he was involved in, but he repeated his assertion that aside from that bank loan he had no other foreign bank or banking relationships or transactions of any kind.

Later he signed an affidavit to that effect.

With respect to the Union Carbide questions which Laski had posed, he asked Mr. Leonard what happened to the last four $37,000 monthly payments in '67.

"I see only the first three deposited. Where are the last four?"

Mr. Leonard's response was that he had unilaterally caused those payments not to be made.

Laski said, "Will you show me some documentation with respect to how you did that?"

The next provision down, 3(e), was the one which, as you may remember, had the ten percent provision lined out and there were no payments apparently received, and Laski asked Mr. Leonard about that, and also in particular about the lining out, and Mr. Leonard said that the parties had agreed, i.e., himself and Union Carbide, to modifying the contract and to cancellation of that provision. Mr. Laski wondered why the initials which appeared in later

pages of the contract that was given to him for changes didn't appear on that page, and Mr. Leonard repeated that the parties nevertheless had agreed that that provision wasn't effective.

Mr. Leonard was next interviewed in June of 1971. Issued notice that Laski's interview ended on the note that he requested documentation with respect to that agreement that Mr. Leonard had described.

Mr. Leonard was next interviewed in June of 1971 by a Special Agent of the IRS by the name of Norman Levy and a Revenue Agent by the name of Joseph Tragna, who was then the auditor on the case.

Laski, by the way, had been transferred to California.

At that time the agents presented to Mr. Leonard copies of Union Carbide checks which had been obtained in the interim, and the first three checks they presented were 1966 checks.

The contract that I have described -- I didn't tell you this, but it's a fact -- was entered into in '67, so these three checks preceded that contract, and Mr. Levy said, "We can't find this $12,000 sum reported as income in 1966. There are checks from Union Carbide to you endorsed on their back, 'Leonard Process Company', and

underneath one of those, the handwritten signature of Jackson Leonard appears.

"Can you tell us about these items?"

Mr. Leonard said he didn't cash those checks, and they then went on to the Union Carbide contract in '67. Mr. Leonard was asked with respect to the $37,000 payments, "We know that the four checks that were issued in the latter months of 1967 were not deposited until 1968 by you in both your personal and in corporate account.

Can you tell us how it was that the checks were issued in '67 and not deposited until '68?"

Mr. Leonard responded that there had been some litigation where Union Carbide and that Union Carbide held up those checks until the matter was settled.

They then moved to 3(e), the provision with the ten percent, and said, "Here are a number of checks in large amounts, and they appear to be endorsed over to the Treadwell Corporation by you, that is, your stamped endorsement appears on the back and beneath it the Treadwell name appears. What can you tell us about that?"

Mr. Leonard explained that that was the payment he received from Union Carbide, and he simply endorsed it over to Treadwell, that he realized no taxable income, since he paid over, dollar for dollar, a hundred per cent.

The meeting broke up with a request for further documentation in the way of invoices issued to Union Carbide Corporation or issued to Mr. Leonard, which underlay those payments, bills that were sent periodically, and the parties met six weeks later, in July. In the interim, Mr. Leonard hadn't obtained any documentation of his own. He did however produce a copy of the Treadwell invoices which he had obtained during that six week period by requesting Treadwell for its copies of the invoices. He produced only that documentation.

In other words, he produced none for the four payments that were supposedly delayed by reason of litigation until the matter was settled, and produced none underlying the contract interlineation.

At the July 28th meeting, Mr. Leonard was asked again for documentation and he said that he had no bills of his own. He had merely submitted the Treadwell invoice on to Union Carbide.

At that point the agents asked if they could see the contract once again which had been shown to Laski at an earlier time, and they were refused, Mr. Leonard's accountant in Mr. Leonard's presence, saying, "We showed it once to Laski, and he looked at it and made notes from it, and that's all you are entitled to. We will not give you

the contract."

What had not been disclosed in the course of these meetings by Mr. Leonard was that with respect to the $37,000 payments there was no litigation with Union Carbide, that he had actually received those checks in 1967 but put them in a desk drawer and waited until '68, the next tax year, for the depositing of $148,000.

In addition, with respect to the variable payments provision in the contract which had been altered and lined out, wasn't in the Union Carbide copy of the contract, that in fact he had been receiving those ten percent payments in the form of checks from Treadwell back to him after he had endorsed the major payments over to Treadwell.

An auditor looking at Mr. Leonard's payments out would have to go to each person to whom he paid money, the rent, the landlord, the stationary store, and ask them if there were any payments coming back to him in the form of an override or a kickback, which would make the appearance of an entire amount paid over misleading.

Mr. Leonard did not reveal that that provision had been effective throughout the term of the agreement, and indeed there were also in his file, which referred to its effectiveness and that there were invoices in his files which

he had returned to Union Carbide establishing that payments were being sought and received.

Finally, Mr. Leonard didn't reveal, in addition to these cash payments, which are sometimes asserted as the hallmarks of a motive to avoid a tax obligation, that he had a Swiss bank account from which he received hundreds of thousands of dollars during the course of 1968 and other years.

The Government submits, members of the jury, that when you have had an opportunity to hear the evidence and to examine the exhibits, you will have no reasonable doubt that Mr. Leonard is guilty as charged in this indictment, in each count.

THE COURT: Mr. Tigue?

MR. TIGUE: Thank you, your Honor.

Ladies and gentlemen, let me repeat something that has been said many times already: that this is not a civil case; it is not a case where the Internal Revenue Service is saying to Mr. Leonard, "You owe us more taxes, and we want our money." This is a criminal case, and in a criminal case the consequences are far more serious, because a finding of guilt in this case brands Mr. Leonard a felon, strips him of his civil rights as a citizen and subjects him to a term of imprisonment.

Therefore, since the consequences are so severe in a criminal case, the rules for proving the case give the defendant in a criminal case every possible benefit of the rules. One of the important rules is that, as his Honor has already mentioned, the defendant enjoys the presumption of innocence. The Government has to prove in this case not that his tax returns may be wrong or are probably wrong or were perhaps wrong. They have to prove beyond all reasonable doubt to each and every one of you that Mr. Leonard signed a tax return which he did not believe to be true.

Now, the presumption of innocence will be defined by his Honor legally at the end of the case, but I sort of visualize it as a seesaw, not a seesaw in an even position

MP 2

but in the bottom position, where the presumption of innocence acts like a large stone on that seesaw, and it is the Government's obligation to lift that stone up and to prove its case.

Mr. Leonard doesn't have to prove a single thing. As his Honor says to you, I need not even stand before you to make an opening statement here. All that we need to do is to sit here and listen to the Government's case and put them to their burden of proving every element of the crime that is alleged in the indictment beyond all reasonable doubt.

Now, the jury in our country performs the most important function, because in our country it isn't the police, it isn't the Internal Revenue Service; it isn't the prosecutor who passes on the fate or the judgment of guilt or innocence of citizens. It is your own fellow citizens in this country, and you have been selected to make that decision in this case, and it is obviously a very heavy responsibility upon you.

Now, as I said, the Government here cannot get away with attempting to prove that there was a mistake, that there was an error of judgment, that his tax returns might have been prepared differently. They must prove that he wilfully, intentionally, knowingly, wanting to do something wrong, signed a tax return which he believed to be false, untrue, lies.

MP 3

Not a mistake, not an honest mistake on what the facts are, not an honest mistake as to what the law is, but lies.

Now, Mr. Leonard has pled not guilty in this case, and he has denied the charges, the two charges contained in the indictment, which are two separate felonies, and I believe that as the evidence develops in this case you will see that the Government will not meet its burden of proof in this case. They will not be able to prove to you beyond a reasonable doubt the charges c ontained in this indictment, because there was no crime committed, not by Mr. Leonard, not by anyone else.

Now, as you sit here and listen to the evidence in this case, I wish you would say to yourselves, "Did there come a time when this man was an honest engineer, chemist, who lived his daily life, and one day he got out of bed, walked to his office and returned home that day a criminal? Did he do something intentionally, know it was wrong, and did he go ahead and do it anyway?"

That is what the Government has to prove here.

I think you will see, as the evidence comes in here, there are some surprising things in this case, things that you might expect to find in a criminal case but don't exist in this case. One of them is, obviously, motive.

MP 4

Now, the Government will say that every taxpayer, all eighty million of us, on April 15th of this year, when we sign our tax returns, have a motive to lie and cheat on our tax returns. That's true. No one wants to pay taxes. Everybody has an obligation to pay what they owe, but no one likes to do it. But, as you listen to the evidence here, ask yourselves the question, please, "Where is the motive, the important, overwhelming motive, for Jackson Leonard to endanger his reputation, his career, his professional license and risk imprisonment to do the things the Government claims in the indictment?"

As a matter of fact, in this case there are two returns. There is a 1967 return and a 1968 return. In the 1968 return he overpaid his taxes by some $15,000. You will see it in a minute, when the tax return is introduced in evidence here.

Ask yourselves, is that the conduct of a guilty man? Is that what a person does when he attempts to cheat on his taxes? He overpays what he is obligated to pay?

Now, there has been much talk during the careful selection of you members of the jury here, about income taxes and the Internal Revenue Service and what-not, but, strictly speaking, this is not a tax case. It is not an income tax evasion case, despite a massive investigation by various

MP 5

officials of the Internal Revenue Service. There is not a claim in this indictment that one single penny was attempted to be evaded or was actually evaded. The charge here is essentially that there was a lie, an intentional, wilful lie on the tax returns that Mr. Leonard alleged signed and filed with the Internal Revenue Service.

I would like you to be clear as to what the charge is. It is not murder; it is not narcotics; it is not robbery or anything else like that. It is a very simple issue, even though the facts are going to be somewhat confused. And there are going to be a lot of facts. You will see many documents and checks and contracts. But the issue is very simple: did Jackson Leonard sit down and take a pen in his hand and sign a tax return which he did not believe to be true?

Now, as his Honor said, the indictment is merely a piece of paper, It is nothing more. It is nothing less. Sometimes you read in the newspapers or you hear on television or radio that someone has been indicted, and you say, "My goodness. How terrible." Well, it is terrible. But in this courtroom it has no value other than the piece of paper that it is written on, because innocent people get indicted; guilty people get indicted, and it is up to you members of the jury to sit here during the next week or so and listen to

MP 6

the people who take that chair and the pieces of paper that wind up in evidence, and it is for you to decide whether those charges in that indictment are true or merely baseless accusations.

Now, the Government prosecutor in this case, Mr. MacDonald, is an experienced, able and zealous attorney, but he has no personal knowledge of any of the facts he spoke of to you. All he knows is what the people have told him in the case. He wasn't back there in 1967 in connection with these tax returns; he didn't have anything to do with the preparation of them; he wasn't around. Even though his opening statementwas firmly and forcefully delivered, it is essentially a hope, a hope of what he expects or will hope that the evidence proves in this case.

And you know, ladies and gentlemen, the opening statements of lawyers are not like political campaigns, where the politicians make their promises and the votes are tabulated, and then the man is elected, and he has a number of years to perform or not to perform. That is not what happens in a criminal case.

In an opening statement the lawyers make their promises; they tell you what the evidence is going to be, and then they must deliver, or you will see if they don't deliver, and at that time you vote.

MP 7

It's a better system. Maybe it's a system which we would use in our political arenas. But here the votes are taken after the person fulfils his promises or you see that the promises are not fulfilled.

The things I say in this opening statement, ladies and gentlemen, are a commitment to you, and at the end of this trial I will have the opportunity to address you again, in my summation, and we will talk at that time as to whose commitments were kept and whose were not.

Now, as I mentioned, Mr. Leonard has no obligation whatever to prove anything. He is innocent. The law says he is innocent until he is proven guilty by the Government. But I would like to bring to your attention some of the things which I believe the facts will develop in this case if they are fairly and fully presented to the extent that they are relevant and admissible by his Honor, Judge Owen.

We have sat here and asked you what your occupation was and what your husband or your wife does and so forth. Let me tell you a little bit about Mr. Leonard which I think the facts will develop here.

I regard it as a privilege to represent Mr. Leonard. He is a citizen of this country. He has a right to a trial, which he is here asserting, and the responsibility rests with you in the most important matter of his entire life.

MP 8

This coming September, Mr. Leonard will be sixty years old. He is married. He has four children. Two are grown; two are rather young.

In a way, I think the evidence will show that Mr. Leonard is an embodiment of the American drean. He is a poor boy who made good, a person who went to Penn State University, a man who worked his way up, starting in the early years, in the 50's with partners, in the latter 50's in business by himself.

He is a chemical engineer; he is a chemist; he is a scientist. He is not a Certified Public Accountant; he is not an Internal Revenue Service agent. He is basically a technical man who is busy building plants, chemical plants for many different corporations throughout the world. You will find that he is a licensed professional engineer in New York, New Jersey, Delaware, Kentucky, and that he is a member of various technical societies and professional asscciations. He writes technical articles for their engineering magazines.

You will also find that he is the head of a foundation which has as its purpose contributions to various hospitals in New York, like Columbia and Mount Sinai, for cancer research. You will find that he is a person who in 1967 and 1968, which are the years in question here, was at the pinnacle of his career. In that year, 1967, he was awarded

MP 9

the single largest contract in his entire professional career. Union Carbide Corporation agreed with him that he would design a $7,000,000 plant in Taft, in Louisiana, and in another town, South Charleston, West Virginia. He would design the process design for that plant. He would also engage a subcontractor, because his company wasn't big enough to do all the detail and the drafting work himself. He got a subcontractor to do that for him, with the approval of Union Carbide.

The job that Treadwell was to do was to do all the detail design. Mr. Leonard was to be the overseer with his company.

Now, let me say a little bit about his company. It is known throughout the world. It has built plants in the United States, in Michigan, Indiana, Florida, Delaware, Kentucky, Virginia. It has designed chemical plants throughout the world, in Belgium, Canada, Australia, Italy, Maxico, Japan, Rumania, England. There are more, but I won't go into all that now.

But the point is that in 1967 Mr. Leonard was at the pinnacle of his career. He had built all these plants. He had now gotten the contract for the largest plant of its kind, not in the United States or in Europe but in the entire world, the biggest one. It was to build an alkylamines plant.

When I say the largest in the world, it had the

capacity to produce a hundred million pounds of the amines per year.

Now, if you are like I am, you are wondering what amines are. They are chemicals which are produced after they go through a process, and these chemicals are used for pharmaceuticals, for dyes, in textiles, for sealing cracks in your house, for rocket fuel, any number, a wide variety of things.

Under the terms of this agreement, of which the prosecutor spoke here, he was to receive $750,000. That was a fee for him. And later, when the contract was transferred to his corporation, that is what they were to receive.

Now, the prosecutor here spoke about the checks which were cashed and what-not. I want to tell you that the money he received, the fixed fee portions under that contract, that three quarters of a million -- somewhat less, because one of the plans was changed -- he reported every penny, every single cent on his income tax return. The money was received during 1967 and 1968, and, after all, those are the charges contained in the indictment, which I will get to in a minute.

The Government wants you to start thinking about 1966 and the other years. We will get to 1966, and you will see the checks that he spoke of whether they were included in income or not. You will see that, ladies and gentlemen,

because that is going to come out during the course of this trial.

Now, it is important that you understand in this case that the contract is not just one contract to build or to design one plant. There are two plants. It is important, and I will tell you why in a minute. One is in Taft and one is in South Charleston, and I will show you the explanation for some of the confusion which goes on when an agent comes in here eight or nine years after the fact and tells you about a conversation he had with Mr. Leonard, because one is talking about apples and the other is talking about oranges, and seven years later the Government comes in and says, "Leonard, you did wrong. You lied to us."

Well, he didn't, and I will prove it to you.

Not only was there a fixed fee received in this contract. There was a ten per cent cost reimbursement provision. Under the terms of the contract, the Leonard Process Company, which Mr. Leonard owned completely by himself, was to receive his three quarters of a million dollars. On top of it, there was an enormous amount of detailed drafting and design work which was required to build this plant, again, the very largest in the entire world.

The Leonard Processing Company did not have the capacity to do it all itself, so it hired this firm, Treadwell,

to do the detail work. And here is where the confusion comes in, and here is the kick-back which you heard about in the Government's opening.

What would happen is this: Treadwell would do the design engineering. They would get their cost. Let's say ten dollars.-- they would get over a period 80 per cent over whatever it was. It came to eighteen dollars. They would submit the bill to Leonard Process Company. The bill would be transferred on to Union Carbide, because even though it was a subcontract, the money was to come from Union Carbide. So when the invoice went to Carbide, Carbide issued a check and said, "Here, Leonard. Here's a check." And Leonard said, "Thank you. Here, Treadwell. Here's your check."

Now, there's a lot of money in this case. It's an awful lot of money, $800,000 and then some in varying odd amounts over a two-year period. Let me tell you something: not one nickel of that was included in the income tax returns in this case, nor was a nickel taken as a deduction for what was given. It was a wash transaction, which went in one hand and out the other. Leonard Process Company didn't receive a bit of the use or enjoyment or benefit of any of that money. It had a zero income tax effect on his books.

Now, that interlining on the contract: I hesitate to say some of this in my opening statement. We should wait

for the testimony, but I can't resist.

Now, you will see a man from Union Carbide: Mr. Mitchell, who will explain how they were signed. There were copies made. It wasn't just an original. Leonard Process got an original, and Union Carbide got a copy, and they kept copies which were conformed.

In the original contract it talks about both plants. It shows the payment schedule and the ten per cent provision for the cost reimbursement. Some time thereafter, like in 1968 or 1969 or whenever it happened, Union Carbide decided, for business reasons, that it would not build the second plant. This had nothing to do with Leonard. They thought the economy wasn't good, or for whatever business reasons they had, they said, "We aren't going to build that second plant, and if we don't build the second plant, you aren't going to get any ten per cent, Leonard, because you aren't going to do any work. If we don't build the plant, you don't do any work, Treadwell doesn't do any detailed engineering, and you don't get your ten per cent."

A line goes on the contract, not an obliterating line. If you will look carefully, you will see what was in there originally. It wasn't all scratched out, as we do when we want to conceal something. Any person can take a look and see what's on there.

I would like to speak to you briefly about time, because the time is important in this case.

The tax returns are 1967 and 1968. That was a long time ago. You know, sometimes when we hear about something that happened, we say, "It must have been a few months ago," but it turns out to be quite some time ago.

Just to remind you about how long ago that is, in 1967 the United States Senator from New York was Robert Kennedy. The leader of the civil rights movement was Martin Luther King. The president of the United States was Lyndon Johnson. In fact, two of Mr. Leonard's children weren't even born then.

We are in 1975 now. We are talking about 1967. 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 -- we are now in 1975, and the Government comes in here and says, "Leonard, let's see what you did. Eight or nine years after the fact, we are going to prove or show that some of the income was omitted, or some of the income was not included."

Now, what has happened over those years? You will see as far as documents are concerned, the Government can't come up even with their own documents. You will see some Union Carbide contracts or documents, but checks or vouchers or things of that sort they aren't going to be able to come up with, because businesses in the ordinary course of their

lives destroy records after a while. They don't maintain them forever. If documents are around, ladies and gentlemen, don't sit there and look at Leonard and say, "Leonard, where are the other documents?" Why doesn't the Government and why doesn't Union Carbide have these? The Government took its time. They started the audit in this case in 1968. The indictment in this case was filed some six or eight months ago, in June of 1974. That's quite a lapse in time.

Now, what else happens during the ensuing time? Memories fade. The Government in this case will ask the witnesses to do things, or they will ask the witnesses to conform to a fallacy, and the fallacy is that human beings are like tape recorders, that they sit down and witness something, and it gets played back later, like the White House tapes, and it comes out like it was before.

Now, ladies and gentlemen, human beings are not like that. You all know that. Human perception is a far more complicated fact-gathering mechanism.

The agents are not sitting there and passively taking everything down. They are participants in the conversations. They sometimes hear the things they would like to hear, because they are law enforcement officials, and, after all, they aren't out for a walk in the park. They are there to do a job, to see if they can make a criminal case.

A person's perception is affected by lots of things: his attitude, the environment in which the statements are supposed to have been made, the manner in which his recollection is refreshed after so many years.

Some of us can remember where we were when the power went out in New York or when President Kennedy was shot, because those things are significant events, which made an impact upon us. But conversation with a taxpayer who is one of many taxpayers over the years -- there's nothing significant, nothing special to remember about that, and the fallacy that the Government is attempting to perpetuate, the implied philosophy here, is that these witnesses keep on constantly remembering the things that they may have heard or may have seen back some six or eight years ago.

Well, people are just too busy coping with their daily lives to be able to do that. It is not a possibility for human beings to remember precisely and accurately the things which were said years and years ago. And I say all this, ladies and gentlemen -- ask yourselves what you had for dinner eight or nine days ago. It's not so easy, not so easy. So when a witness takes the stand and says, "I had a conversation four or five or six years ago when Mr. Leonard or his accountant or anybody else," say to yourselves, "Is that what really happened? Is he trying to please his superiors, his

subordinates, his colleagues, the prosecutor in this case?"

It takes a certain kind of person in a case like this to say, "Listen: after so many years, I simply don't remember. I would like to help you, but I don't remember."

Now, sometimes conversations are recorded by notes or a court reporter, like this gentleman over here, and everything is very accurate as to what was said and preserved and what-not. Pay particular attention to people who don't take notes or don't have notes to rely on to refresh their recollections here.

Now, as I said, this is not strictly a tax case. What I nave done here is to make a blow-up of the law which my client is charged with violating. Let me read it.

"Any person who (1)" -- and this is just the title here -- "wilfully makes and subscribes" -- the "makes" means you file a tax return, and "subscribes"means you sign it -- "any return, statement or other document which contains or is verified by a written declaration that it is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter" --

It's a subjective charge. That is, when a man puts his name on a tax return, what is relevant is what he believes to be true or not true.

Now, that is the general language of the statute,

but the indictment in this case -- and I won't read both counts again, because Judge Owen has done it -- but basically the two counts are identical except as to years and numbers. On a certain day in June 1968, did he make and subscribe an income tax return which he did not believe to be true, in that some of the adjusted gross income was omitted?

The reason I am taking your time up with this, ladies and gentlemen, is that that is a very precise law. The contents of theindictment are very precise. They don't say anything about a Swiss bank account. It's no crime to cash checks. You will see whether or not there are altered invoices here or any back-dated payments or any money that was not reported in his income tax return.

This is a very narrow charge, and I ask you, as you listen to the evidence, to say to yourselves, please, "How does that relate to the law which Jackson Leonard is supposed to have violated here? How does that fit within the terms of the indictment?"

Now, the indictment charges that the tax returns we are talking about are his personal income tax returns. They are not the corporate returns, and there was a corporation involved in 1968 here which received the payments that Mr. MacDonald discussed in his opening statement. These are the personal returns of Mr. Leonard which are charged here with

being false, and it is the only charge here in the indictment. It is not a charge of a false contract; it is not a charge of any false affidavit, because if the Government could prove that, there would be a longer indictment, and the third count of that longer indictment would say that he filed a false affidavit and he lied in addition to filing false returns.

Now, what the Government is alleging in this case is not on the deduction side; it is not on the income side. For instance, in the 1967 tax return there are some $300,000 in deductions which were taken, and there is not a word in this indictment about any deductions. There is no allegation that there are misstatements, and there is anything misstated or distorted or anything of the sort.

And with respect to this contract, you will see that it is a baseless distortion of reality, what happened with respect to this contract, and you will see it as we go into the trial.

Now, let me just show you for a minute what I am fairly confident the evidence will show here, that the figures are not quite as clear as Mr. MacDonald said here, because, for instance, both years are essentially the same in the indictment. There is a 1967 return and there is a 1968 return.

Let's take the first year. Let me say again: it is

not an income tax evasion case. For the first two years, Mr. Leonard paid $110,000 in income taxes. It is not the kind of situation where you hear that people who earn an enormous amount of money don't pay any income taxes. $110,000 in income taxes was paid in those two years, ladies and gentlemen.

Now, both of these income tax returns were prepared by a Certified Public Accountant. They were not prepared by Mr. Leonard, and one or both of the returns, as you will see as the evidence develops, were shown to his lawyers, and the 1967 income tax return had gross income of over half a million dollars.

So $507,000 was reported in 1967, right over there, and Jac k Leonard paid the income tax on that. The Government says in this case that the adjusted gross income is off. It is not right. There is a number that is not included in there, so they say. It is approximately $24,000.

Now, that comes to something around four per cent of the total half a million dollars which was reported and on which tax was paid.

If you plot the percentages, that is like a man who earns a hundred dollars a week, so lop off that, and if you apply down what they claim by the same percentage which was omitted, it would be like a man who earns a hundred dollars a week, or five thousand dollars a year, and omits

$240. That the nature of the charge here.

Now, let's look at the numbers in this case. Mr. Leonard has been fortunate. He has earned some money in his lifetime. It wasn't always that way. Please don't hold that against him. Please don't say, "Oh, the guy's made a lot of money; he must be cheating on his taxes." That is not what the rules are here, ladies and gentlemen. That's okay when we talk to our friends, but this is a very formal proceeding here.

Another thing about the tax return which the Government claims was signed here, that Jack Leonard knew that he was signing a false return, is that it is no simple return. I think someone said that they had a very simple form, the short form which they used, which they filled out and sent in. The tax return in this case, which will be introduced shortly, is, for instance the 1967 return, is some twenty-four pages. Not a simple matter. It's a business. It's not an individual return. It's not a situation where, like many of us, you get a W-2 form at the end of the year, and you either take the short form or you take your itemized deductions, but basically your income is shown on one little piece of paper.

Here, there are many plants and many purchase orders and many kinds of receipts which come in over the years.

When Mr. Leonard got his big contract that he had been working for his whole life, in 1967, he said, "Here, Mr. Leskowitz, CPA, please help me. Please file my tax return. Please set up the corporation's books here and make sure you get yourself the cash receipts and the cash disbursements and the general ledger and so forth, and take care of that, because it is important. I don't want to be bothered with that. I've got other things to do. That's your job."

Edward Leskowitz -- remember that name? He is the Certified Public Accountant who prepared the tax returns here for this firm.

Another thing that you might think strange -- that you don't find in a criminal case -- is that the amount of money which they claim is omitted here, this $24,000 -- the exhibit which the Government will introduce shortly will show you that his charitable deductions for that year were $35,000. $11,000 more, more than the money the Government claims in the indictment was omitted from his income tax return..

I think you will find that these are some surprising facts which will develop during this trial, which you would never expect to find in a criminal income tax evasion case. It is not a situation where, like with many of us, the IRS says that it is not deductible -- "Pay us the tax." Fine.

That's not what happened here.

Now, if I may rease that board for a moment, I would like to speak to you very, very briefly about what is adjusted gross income.

This is a very simple example, I hope.

In our country, you don't pay your income taxes on the gross amount of income you receive. That is, if you are a business and you receive from a supplier ten dollars, let's say, and you have an employee who works for you and you have to pay him wages, the net benefit to you is, say, eight dollars, ten dollars hess two dollars.

In the terms of the Internal Revenue Code, there is a term called gross income, which under my little example would be -- I'm sorry; I've got it wrong already -- ten dollars. Let's say there was some kind of an expense, payroll, let's say. The man who owns the company has to pay his employees two dollars. Eight dollars is the difference, and that, ladies and gentlemen, is the adjusted gross income in that transaction or that business, if this were the only transaction for the year.

It is that which the indictment says is wrong. It is that which the Government must show you did not include this $24,000, even though a half million dollars was reported.

Furthermore, ladies and gentlemen, you will see that

the proof in this case is that the gross income in general terms -- theoretically here it doesn't make any difference if the gross income is eleven dollars and the expenses are three dollars. It is the bottom line which counts. That's why it is charged in the indictment. This is the number that is important, not the gross receipts or the expenses, assuming they are accurate. Eight dollars is what is required to be reported on the income tax return.

And that is the essence. That's the very heart of this case.

The Government says, "Leonard, your AGI is no good in this case." There is no allegation here about the gross receipts or the expenses. It is the adjusted gross income in this case.

Now, the usual way these disputes are resolved is that the Internal Revenue Service issues a bill called an assessment, and this says, "Pay it or go to tax court," and you can pay it, and that's the end of it. Or if you don't agree with the way the Government is determining your tax, you may go to the tax court.

The proof in this case will show that that is what Mr. Leonard did in the prior years. There were prior years in dispute here, and Mr. Laski, the first revenue agent in this case knew about it.

So in this case they conducted an investigation. Mr. Laski, incidentally, was on the case in 1968 and in 1969, and he finally left in June of 1970. One revenue agent assigned to the case, working on the Leonard case. They don't send a bill, so therefore it is not possible for Mr. Leonard to say, "Here is a check for the amount disputed" or "I'm going to tax court. I don't agree with what you guys say."

The agents here say that is what he did last time. "No bill this time. We are going to recommend that he be prosecuted, because we don't agree with the way his gross income was reported on his books.

I think, ladies and gentlemen, the proof in this case will show that Jack Leonard, when he signed that return or whatever return he did or did not sign -- you will see that he honestly believed that whatever statements he was making were true. He believed it was true, and that's what the law says. Remember, it is his belief which is important in this case.

Now, briefly, in December 1968, with the advice of his attorneys, Mr. Leonard had a corporation. He activated it, and with the advice of his attorneys he assigned all of the assets that he had in his personal capacity. He transferred them all to the Leonard Process Corporation, the corporation called Jackson Leonard Process Company, Inc., or something

close to that, and one of his assets, one of the assets he transferred was the Union Carbide contract.

Where these fixed sums were payable and on the odd amounts, the ten per cent amounts, the expense reimbursement was also payable. He said, "I take it from myself and I give it to my corporation", which is legal, perfectly legitimate, and you will see that he and Carbide agreed to it, and there is a document that will show the whole thing.

But the owner of that corporation was still Jackson Leonard. He owned a hundred per cent of the stock. He was the president of the corporation, but it is now a different legal entity, and the income under the Union Carbide contract was the income of the corporation, not Jackson Leonard, not as the indictment here in Count 2 says, but in his 1968 personal income tax return, the money received under that year 1968 was the corporation's income, not Leonard's income.

I want to take a minute to just briefly discuss the sub-chapter.

Now, this is really one of those things taxpayers pull their hair out about. Basically it says this:

If Tigue owns all of the stock of a corporation, whatever the c orporation makes in the way of profits, whether there is a difference or not, it is all taxable to Tigue in the year that the fiscal year ends.

What happened in 1968? This new corporation did not have the same fiscal year like we have. We all have a calendar year, by and large. This new corporation had its fiscal year ending on January 31, 1969, and the tax rules, as you will see, are that the income that is earned for the year starting February 1968 and ending in January 1969 are not includable in anybody's income until some time in 1969, that is, they don't go into Jac k Leonard's income in 1968.

The income from that corporation, if any, was includable in Leonard's 1969 income tax return, if it was part of this adjusted gross income.

Now, the claim here really is essentially that Leonard embezzled these portions of these ten per cent funds by taking them out of his corporate pocket and putting them into his personal pocket, which -- as his Honor said, you are going to keep your common sense with you, ladies and gentlemen -- doesn't make any sense, I suggest.

The secret in this case is that the corporation which was formed lost money its first year, some $73,000 or so, and even if all that money that the Government claims, that the indictment claims here, was included in the corporate tax return, there still would be no tax effect. Jack Leonard would not pay one more cent of taxes.

And if that is the motive in this case to cheat on

your taxes, there is no motive, and there is no cheating.

Now, the Internal Revenue Service started an investigation here, and, as I said before, Mr. Leonard had been audited in prior years, and he had gone to the tax court and what-not, and there was all kinds of tax paid or adjusted during that period of time, and the IRS conducted a thorough investigation in this case, ladies and gentlemen, and when I say "thorough" I mean thorough. I don't mean checking medical deductions, checking an exemption or what-not.

His new-found accountant --

THE COURT: Mr. Tigue, let me stop you. I don't want to interrupt you, but may I ask you gentlemen to come up here for just a moment.

(At the side bar:)

THE COURT: How much longer do you think you will be?

MR. TIGUE: I would say five to ten minutes, your Honor.

THE COURT: I have an appointment with the Chief Judge at a quarter of five.

MR. TIGUE: I am almost coming towards the end, your Honor.

THE COURT: You have a witness you wanted to get on today, Mr. MacDonald. Obviously, he won't make it. Would

you take him first thing in the morning?

MR. MacDONALD: I hesitate to, but if I am forced to, I will.

THE COURT: Well, that obviously is a problem.

(In open court:)

THE COURT: I am sorry to have interrupted. Go ahead.

MR. TIGUE: The CPA, Mr. Leskowitz, worked on this investigation with the agents in preparing for the agents, in preparing for meeting with the agents, for some 588 hours. He submitted a bill to Jackson Leonard for $16,000 for that.

Let me just tell you briefly the agents that he dealt with during that period. You know, I am sure that Leonard and his accountant felt like Fran Tarkington yesterday, if any of you saw the Super Bowl. I mean, talk about the blitz. There were six revenue agents, and if the court reporter doesn't have all the names, I am not going to spell them out.

Revenue agents are the accountants. They come in and audit your tax returns. On top of that, they had three special agents. They are the sleuths or law enforcement officials for the Internal Revenue Service. They are authorized to carry a gun; they carry a badge and can serve summonses and that kind of thing.

To mix things up, while this audit is going on, to perhaps put a little pressure on, you will see there were some collection agents beating on him to pay taxes and collect taxes, even though in one of the years he did not receive his own refund.

Now, there were some thirteen agents who worked on this case, and there are more.

These agents pored over every single record of Jackson Leonard's office, invoices, canceled checks, bank statements, checkbooks -- you name it. Nothing was left unturned, nothing whatever.

Now, some of us in that set of circumstances or facts might get a little annoyed, might say, "Listen, guys, I am not going to cooperate with you." But Jack Leonard was interviewed on no less than four occasions by special agents. He was interviewed by others. His CPA spent hundred and hundreds of hours with the special agents. He got other records they asked him for, and they came back year after year.

Mr. MacDonald very quietly went over some of the years in question. He started in 1968. The Levy conversation he talks about was in 1971, three and a half years later. And there were other interviews, in 1972.

Now, after all of this audit, investigation,

accusation, litigation, the claim is under the first vear, 1967, some $24,000 was not properly handled, was not properly reported and that he intentionally left it off his tax return.

Now, Mr. Leskowitz -- we will see what the evidence develops about him -- prepared the tax returns in this case, and he mentioned that he submitted a bill to Mr. Leonard, and I am sorry to say that they are no longer having a professional relationship any more. He is no longer Mr. Leonard's accountant. There is an outstanding bill, and there is a big dispute about that.

Mr. Leskowitz earns his living dealing with Internal Revenue Service agents, and you should listen to his testimony if and when he appears. Just kind of put those things in the computer when you judge credibility, because, after all, it is the quality of the evidence that is offered here, not the quantity. Adolph Hitler could come and say he lived in the United States between 1933 and 1945 if he wanted to, but it would not be credible.

In his opening statement, Mr. MacDonald referred to cash checks and invoices and altered contracts and Swiss bank accounts. Ladies and gentlemen, those are not just little smokescreens or red herrings. Those are big whales to take your attention away from the lack of proof here.

After that massive investigation, the Government will not be able to prove its case.

Now, one last thing, ladies and gentlemen, and I will conclude.

Under the rules of the Court, the Government goes first, so they will be putting the witnesses on and so forth. They make the opening statement first, because they have the burden. You remember, I mentioned the burden of proving beyond a reasonab le doubt. They have the burden.

I know last impressions are good. The witness seems very nice, and he tells the story, and it sounds reasonable. But wait at least for some cross-examination. Wait until the case is over and Mr. MacDonald and I sum up and his Honor instructs you, before you form the basis for any conclusions you may arrive at in this case, because remember the old story about the gold prospector who cooks his own pancakes. No matter how thin he makes them, they always have two sides.

There are two sides to every story, ladies and gentlemen, to every story, and when the evidence is all in in this case, I think that you will be convinced that Jackson Leonard did not sign any tax returns which he did not believe to be true. The Government will not be able to prove its case beyond all reasonable doubt, and I am confident of that

CMP.

because basically, ladies and gentlemen, I believe, as you do, that the truth will out.

Thank you very much.

THE COURT: Now, ladies and gentlemen, we will stand in recess until ten in the morning.

Don't discuss the case with each other or with anybody else. I will see you at that hour.

Good night.

(Adjourned to January 14, 1975 at 10:00 a.m.)

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UNITED STATES OF AMERICA

vs. 74 Cr. 509

JACKSON D. LEONARD

January 14, 1975
10:00 a.m.

(In the robing room.)

MR. TIGUE: Good morning, your Honor.

Your Honor, I would respectfully ask the Government, or ask your Honor, to direct the Government with respect to an offer of proof on two matters.

One, the 1971 and '72 income tax returns, I believe the Government's first witness will be a woman from the Service Center, who will put the returns in evidence.

MR. MAC DONALD: She would merely identify them as being the defendant's '71 and '72 tax returns. They will be identified. They will not be offered in evidence at this time.

MR. TIGUE: The other matter, your Honor, is with respect to Agent Laski. I don't know if he is going to be the first witness or not. I see Mr. Mitchell is present.

MR. MAC DONALD: The girl will be five minutes.

Mr. Mitchell is the Union Carbide purchasing officer.

MR. TIGUE: Maybe I ought to save this until later, but it's my application to exclude testimony relating to the affidavit with respect to whether it is a similar account and so forth.

I finally had a chance to read Mr. MacDonald's memos last night, and I would just like to make the application that the allegations, or what the Government intends to prove there -- I have copies here, you Honor, but I am afraid they are all marked up.

THE COURT: I gave my copy to my clerk.

MR. MAC DONALD: Here they are, Judge.

THE COURT: I gave the clerks the originals to work on.

MR. TIGUE: Your Honor, in addition to my original argument that the probative value versus the overwhelming prejudice and the fact that it comes at the last minutes, and what not --

THE COURT: This is the $383,000 figure; shorthand it that way.

MR. TIGUE: Actually, your Honor, what the Government will do is put in the affidavit, number one, and then attempt to show from the receipt of these funds that in fact

he had a Swiss bank account.

I think the Government will not be able to prove that in fact he did have a Swiss bank account, or that the affidavit is false.

THE COURT: Any transactions or dealings. Not that he had a bank account, but that he had transactions or dealings. Is that right?

MR. TIGUE: The dealings were with the Chase Manhattan Bank, your Honor.

THE COURT: I know, but I assume the Government is going to prove that he knew that this was a dealing with a foreign bank. If it doesn't prove that, then obviously the conflict with the affidavit is not established and it shouldn't be -- the 383,000 shouldn't come in. But Mr. MacDonald, under my inquiry yesterday, told me that they were going to prove that Leonard had knowledge that these monies came from a Swiss bank account.

MR. MAC DONALD: We will prove that Mr. Leonard admitted control over a number of Swiss bank accounts of his own during the relevant period and that, when circumstantially, coupled with the receipt of $383,000, at least one of which is explicitly identified to the Banque Cantonale of Zurich, establishes the very bank and the numbered account in that very bank.

THE COURT: Well, I think on that basis we should go forward.

MR. TIGUE: Your Honor, my additional argument would be that indeed what the Government is attempting to prove with that affidavit is essentially a similar act and, I submit that it's not at all similar to what is charged in the indictment. What's charged in the indictment is that basically he omitted income. What the Government attempts to prove as to the affidavit is that he denied the existence of an account.

I think that those aren't similar. I think they are wholly dissimilar, your Honor.

THE COURT: Let me posit the proof in another way, as I see it. Probably I ought to let Mr. MacDonald do it, but let me see.

The Government charges the signing of the return not believing it to be true. The alleged falsity is the understatement of income. This affidavit is a statement that is supportive of that false return, assuming that the facts were all so. It is supportive of that, but it goes to continue the concealment from the Government of the sources of money of the very types that are involved in the indictment by putting this thing, as you would put it, and therefore I regard it not only as a similar act but

but as a supportive act, connected to the very returns that are under investigation at the time.

MR. TIGUE: But there is no claim here, your Honor, that the amount of money which is omitted or claimed to have been omitted in the indictment, has any connection with any Swiss bank account. The Government doesn't claim that there were deposits in a Swiss bank account or that there was money put into a Swiss bank account as a wash transaction of any kind.

What they claim here is that the money came in in the form of a check from the Treadwell Corporation and it was cashed.

That's what they claim.

It's really unrelated to a Swiss bank account. It's the old waving-the-bloody-shirt argument.

What the Government is proving here is not really the charge in the indictment. It's not. The money that is charged to have been omitted in the indictment is wholly unrelated to the Swiss bank account, and I don't think the Government makes any claim that it's related to that.

MR. MAC DONALD: Anybody readin this record ought to notice that there's no acquiescence in counsel's statement that the cash that Mr. Leonard took away from the

First National City Bank didn't come to rest in Zurich, as we hope to persuade this jury, and that he employed cash methods, and he employed unique bookkeeping methods and he employed Swiss bank accounts, all traditional criteria and indicia of willfulness under the traditional cases, and naturally the jury is instructed that they might consider unusual bookkeeping entries or the lack of business records or cash transactions, or the equivalent of a Swiss bank account as showing wilfulness, and we don't acquiesce in counsel's statement that there will be no argument that Mr. Leonard didn't employ the device for, that wilfully evading his tax obligations and wilfully filing a false statement toward that end.

THE COURT: Mr. Tigue, couldn't you let me put out this hypothetical for now.

Let's suppose the Government in a tax evasion case charges that there is a particular $50,000 that wasn't reported and on the eve of trial they discover a second $50,000 that wasn't reported.

Isn't that second 50,000 admissible on the intent in the first 50, other factors being appropriate?

MR. TIGUE: Well, if it happened on the eve of trial, I think defense counsel would ask for a continuance. Maybe he would get it or maybe not.

THE COURT: I remember defending a case here two or three years ago where my client was charged with obtaining loans on $40,000 worth of stolen securities, and he had done it in his own name, and I was prepared to persuade -- understand I believe I would have successfully persuaded the jury, that he would not have been so foolish as to criminally do it in his own name if he had known they were stolen. It was one transaction.

To my surprise, dismay and others, the Government came up during the trial with $450,000 of identical transactions in New Jersey, and they went into evidence and obviously the jury found the entire package too much to swallow, on a theory of stupidity, which was their absolute province, and I felt at the time that that was admissible, although it came in absolutely from left field, but it was the same type of thing of permitting the jury to choose that the first $40,000 wasn't a mistake, error or stupidity.

MR. TIGUE: I would say that that was a perfectly classic example of a similar act, which is not what we have here.

I don't think that if a man says "I don't have a Swiss bank account, it's not similar to understating his income on his tax return.

THE COURT: No, but if he says "I don't have

any transactions with foreign banks," and it turns out that he has -- I gather the Government is contending that -- he says, "I have no transactions with foreign banks and then the Government proves that he has had transactions with foreign banks in a rather substantial amount.

We are assuming the proof is going to support this.

MR. TIGUE: Well, there's only one check which, as far as I could tell, has indicated that it came from Switzerland. So at best, even under the Government's theory here, that would be the only thing admissible under this issue.

That quarter of a million dollars in checks, your Honor, seems to me to be so prejudicial ---

THE COURT: Isn't the Government going to come forth with some evidence tending to show that he knew or must have known that that other quarter of a million was from foreign bank accounts?

MR. MAC DONALD: Mr. Tigue is referring to the notations on the carbon copy of the checks, and some of them simply say "other demand deposits"." Others of them say "H/O International." The final one says, "Head Office, International Cantonale, Zurich."

THE COURT: This is Mr. Leonard's handwriting?

MR. MAC DONALD: The bookkeeper in the bank put that notation on, indicating the source of the funds being transmitted to Mr. Leonard. We say the $138,000 instrument is circumstantial proof of the source of the funds stated in that one explicitly to be Zurich is circumstantial proof of the source of the funds for the other one marked "H/O", without any other designation.

In addition, we have some oral proof which will tie --the bank officer-- one of the things that when you -- I am sure your Honor in that trial caught the $450,000 worth of stolen bonds from the witness stand for the first time, and had to field it mid-trial.

One of the things is that when you put your evidence out in advance, you find yourself writing the script for counsel on the other side.

The bank officer will testify that the fan-fold form that the Chase Manhattan Bank employed by its international receiving and paying teller to instruct the branch to pay somebody, recited -- I am going to be generic for the moment -- recited a Swiss source for every-one of those checks. That form goes into the credit files, and the credit files are destroyed at the end of the year, both the carbon copy of the international paying and receiving teller and at the branch where the original went

to causes the checks to be prepared and issued. The bank officer nevertheless recalls the contents of that business record, and we will offer his best recollection of what the writing said on that subject, and thus, I think, there will be an adequate basis for direct evidence, without relying on the circumstantial connections between the various checks to show that they had a Swiss -- that the funds were from a Swiss bank and were paid to Leonard on the directions of a Swiss bank.

I think that's an offer of proof with respect to the bank officer's testimony concerning those business records and the fanfold form.

His testimony will be a little more detailed. I don't know why I am withholding it. He is going to say, further, Judge, that his best recollection is that it was an identified Swiss named bank, although he can't remember the name, and the Banque Cantonale doesn't refresh his recollection, and further that the funds were designated on that fanfold form as coming from a numbered account at such a bank.

THE COURT: When are you going to hit that proof, in terms of time?

MR. MAC DONALD: Wednesday.

THE COURT: Let me give consideration to the

ramifications of that.

MR. TIGUE: Thank you, your Honor.

One further remark.

(In open court.)

THE COURT: Good morning, ladies and gentlemen. Mr. MacDonald, you may proceed.

MR. MAC DONALD: The Government calls Mrs. Wendy Brewer to the stand.

xx W E N D Y B R E W E R, called as a witness by the Government, having been first duly sworn by the Clerk of the Court, testified as follows:

xx DIRECT EXAMINATION

BY MR. MAC DONALD:

Q Mrs. Brewer, will you tell the jury what your occupation is?

A I work for the Internal Revenue Services at Brookhaven Service Center on Long Island.

Q I am going to move the pedestal back about a few feet to make sure I hear you.

THE COURT: Speak up.

Tell us again.

A I work for the Internal Revenue Service at Brookhaven Service Center on Long Island.

Q What do you do for the Service Center on Long Island? What's your specific job?

A I am clerk in Special Search.

Q What does that mean? What are your duties as a

Special Search Clerk?

A We locate returns, any documents that can't be found through normal channels, and we might have to use microfilm, I.D.R.S., which is a television screen which is hooked into a computer, and we get the information straight from the computer.

Q Have you at my request, conducted one or more of those search techniques with respect to a tax return for Jackson D. Leonard and Sondra Susan Leonard?

A Yes, sir.

Q For 1967 and 1968?

A Yes, sir.

Q Would you look at Government's Exhibit 1 for identification and tell the jury if you are able to identify that exhibit?

A Yes. It's 1040 for a period 67/12, for Jackson D. and Sondra Susan Leonard, and it has the document locator number that is the same on the microfilm.

Q Do you recognize any other markings on the front page of that 1040, and if so, will you tell the jury which markings you recognize and identify those.

A Okay.

There's a stamp, "Internal Revenue Service in Manhattan," that it was received in their mail room on

June 17, 1968, and there is a "S.O.I." stamp on it, which is Statistics of Income, which is a group in the IRS.

And there is a "F.A.", which is Field Audit, within the IRS. And there's letters written in brown, and that is part of what we would use to process the return.

Q Information that you would put into the computer?

A Yes.

Q Now, would you look at Government's Exhibit 2 for identification and tell the jury if you recognize that document and can you identify it?

A It's a 1040 for the period 68/12 for Jackson D. and Sondra Susan Leonard.

Q In the upper righthand corners, is there a number which was placed on that exhibit?

A Yes. The document locator number is the same as the one I found on the microfilm transcript.

Q Would you tell the jury if a component or components of that document locator number indicate the date on which the document was received by the IRS?

A In the Internal Revenue, for the document locator numbers, we use a julian date, and it goes by a julian calendar, and on January 1 is the first day of the year and it goes up to December 31, which is a 365th day of the year.

Q So if the document were received on February 1st, it would receive the number 32 as the julian number for that day of the month?

A I suppose. I don't know offhand.

THE COURT: Miss Brewer, what I gather is that -- can I see that exhibit? Where are you?

THE WITNESS: Right here.

THE COURT: So this number with all of these 2's, followed by a 908 is the julian date?

THE WITNESS: 228 is the julian date on that.

THE COURT: I see. And the Julian calendar is a calendar which runs by the day into the year that you are in, is that what it amounts to?

MR. MAC DONALD: I believe that's correct.

THE WITNESS: Yes.

THE COURT: In other words, if it is received on the 200th day in the year, it gets the number 200?

THE WITNESS: Right.

THE COURT: I understand.

Q In the center of that page is there a stamp marking that you are able to identify for the jury?

A Yes. It says "close survey before assignment," and the date November 13, 1970. It's from Field Audit.

Q Beneath that is there an additional stamp marking

the jury can identify?

A Yes. It was received on August 8, 1969, in the Philadelphia Research Center.

MR. MAC DONALD: We would offer Government's Exhibits 1 and 2 for identification.

THE COURT: Any objection?

MR. TIGUE: May I see them, your Honor?

THE COURT: Very good.

MR. TIGUE: Just one or two questions on the voir dire, your Honor.

THE COURT: Yes.

xx VOIR DIRE EXAMINATION

BY MR. TIGUE:

Q Mrs. Brewer, do you have any idea how these returns were prepared or assigned?

A No, I don't.

MR. TIGUE: I would object, your Honor, on the grounds of relevancy unless it is going to be taken subject to connection at a later date by another witness.

THE COURT: I take it the offer is only of a document that is in fact filed with the Revenue Service, and is found in their files?

MR. TIGUE: Yes, I do not object on the grounds of authenticity, your Honor, because those are the Govern-

files. It's a matter of relevance. I don't believe there is any connection with this case yet established through Mrs. Brewer.

THE COURT: I will take it subject to connection.

x (Government's Exhibits 1 and 2 received in evidence.)

xx FURTHER DIRECT EXAMINATION

BY MR. MAC DONALD:

Q Mrs. Brewer, in addition, last week, did you conduct a further search of the indices and microfilm at the Service Center for Tax Returns for an entity known as Leonard Process Co., Inc.?

A Yes, sir.

Q Will you tell the jury what you found in that regard?

A From the microfilm we found that there was no 1120's filed for that company for '68, '69, and '70. We had no record.

Q What's a 1120?

A It's a corporate tax return.

Q Finally, I would like you to look at Government's Exhibits 83, and 84 and tell us if you are able to identify these?

A 83 is 1040 tax return for 71/12 for Jackson D.

and Anne Leonard.

Q Does it bear a document locator number similar to those you have already described?

A Yes, it does.

Q With the Julian calendar notation of receipt as well?

A Yes.

Q Would you look at the next exhibit, please, and tell the jury if you can, identify it?

A It's a 1040 return for the period 72/12 for Jackson D. and Anne Leonard, and it has --

THE COURT: When you say for the period 72/12, that means for the 12 months of '72, is that it?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: I'm sorry.

Q Does it also have the same julian calendar locator number indication of receipt?

A Yes, it does.

MR. MAC DONALD: We have nothing further of Mrs. Brewer.

THE COURT: I take it you offer those -- no, you identified them.

MR. MAC DONALD: I withhold the offer for the

time being.

THE COURT: Very good.

MR. TIGUE: May I question, your Honor?

THE COURT: You may.

xx CROSS EXAMINATION

BY MR. TIGUE:

Q Mrs. Brewer, do you have Government's Exhibit 2 before you?

A Yes.

Q Would you take a look at the first page here, which I believe is the julian number. I am a little confused on it.

Would you tell me what the first few numbers mean?

For instance, there are two numbers, two large numbers, 22, followed by 223.

Would you tell me what those mean?

A Okay.

That's 229. But the first 22 is the district, which is Newark District. 229 is the type of form it is. It's an audit form. The first 22, of that 222229 means that it is in an individual file, it is not business.

And then do you want me to explain the whole number to you?

Q Please.

A The 092?

Q Yes.

Q This large? That's the julian date.

Q Does that mean the 92nd day of the year?

A Yes,

Q Of what year?

A This would be '72. I can tell by the color.

Q You have Government Exhibit 2, do you not? That is a 1968 return?

A Yes.

Q I believe.

A Yes.

Q Does that mean it was filed in 1972?

A No, that's just -- you are looking at this number right here?

Q Yes.

A That's an audit number. They just stamp that on when they are auditing.

Q So 092 is not the julian number?

A It is the julian number, but it is not the julian number for when the return was filed. That would be this julian number.

Q That is what I want.

A Okay.

Q Sorry. I have been asking about the wrong number, which I can't see on my copy.

MR. TIGUE: May I just approach, your Honor?

THE COURT: You may.

Q Will you indicate where the julian number is?

A Okay.

Q By that, what I am really looking for is the date that it is indicated it was filed?

A It's 227,

Q 228. That would be the 228th day of the year?

A Right.

MR. TIGUE: I have no further questions.

Oh, I do have questions for the corporate return.

Q Did you receive a subpoena that I issued in connection with the corporate return?

Let me show you what I marked as Defendant's Exhibit A for identification. Tell me if you have ever seen that one before, particularly page 2.

A No.

Q And you conducted the search for the corporate return at the request of Mr. MacDonald?

A Yes.

Q And you mentioned the form 1120 -- may I have this back?

A Yes.

Q You mentioned the form 1120.

Could you tell me how the 1120's are filed, please.

A They are filed in document locator number order.

Q And are the 1120's filed differently?

A They are filed along with them.

Q They are all filed in the same order.

Do you need the employer's identification number to find the corporate tax return?

A Sometimes you do and sometimes you can find it from alpha tapes, for "N" microfilm unit.

Q In this case did you need the employer's identification number or did you go to the company's name?

A We went to the company's name.

Q Can you tell us, Mrs. Brewer, how long the records are maintained by Internal Revenue Service of income tax returns filed?

A I really don't know.

MR. TIGUE: Thank you.

No further questions, your Honor.

MR. MAC DONALD: May we approach the side bar

for just a brief discussion.

(At the side bar.)

MR. MAC DONALD: Mr. Tigue, in a letter to me, and perhaps with a copy to the Court, made an extensive request for 3500 material. For this witness I have provided the Court with a document marked 3504A, and it consists of my notes made in my talking with Mrs. Brewer. I represent to the Court that I am not a verbatim or a substantially verbatim notetaker, and that I would so testify if Mr. Tigue called me to the witness stand, as he indicated a desire to do, I believe.

MR. TIGUE: About that, yes.

MR. MAC DONALD: And there is no other 3500 material for this witness than the document which I have provided to the Court.

We make a principal objection to disclosing assistant U. S. attorney notes and essentially Q and A sheets, on the basis that they are not within the intendment of 3500 material.

MR. TIGUE: If he is going to delete the other names, I would like to see what's left. I think Section 3500 requires that if the Government is going to delete some he has to show what's deleted, but he has to show that.

THE COURT: Aren't we crossing a bridge? You haven't indicated any desire to cross examine this girl for any materials.

MR. MAC DONALD: Mr. Tigue informally had asked me for 3500 material in advance of cross examination, and I didn't want him to think that there was none for this witness and not call to his attention the document which I presented in camera to the Court, and which we object to disclosure of, on the basis it is not 3500 material.

There is nothing else except for that.

MR. TIGUE: I would just like to formally request on the record that I am requesting it. I know the law says sometimes if you are not asking for it it is your fault. I am asking for it.

THE COURT: Mr. MacDonald, what is it that you object to on 3504A?

MR. MAC DONALD: I object to Mr. Tigue's being shown any of it, because none of it represents the statement of the witness. She never read this, she never otherwise adopted or approved it, I never showed it to her or asked her to adopt or approve the contents.

I am the author of it. And I am not a substantially verbatim notetaker, and accordingly it is not the witness' statement, it is my own Q and A sheet or work

product. And I object.

THE COURT: In this case it certainly appears to be so. Therefore, I decline to turn it over. I will mark it appropriately for appellate review.

MR. MAC DONALD: Judge, this whole packet will be marked as one exhibit at the end of the trial.

THE COURT: All right.

MR. TIGUE: May I ask what you are referring to?

MR. MAC DONALD: These are all 3500A exhibits, which have been submitted to the Court.

MR. TIGUE: All right.

(In open court.)

THE COURT: Miss Brewer, you may step down. Thank you very much.

(Witness excused.)

MR. MAC DONALD: The Government calls Mr. Henry Mitchell as its second witness.

xx H E N R Y R A Y M I T C H E L L, called as a witness by the Government, having been first duly sworn by the Clerk of the Court, testified as follows:

xx DIRECT EXAMINATION

BY MR. MAC DONALD:

Q Mr. Mitchell, would you tell the jury your

current occupation, please.

A Yes.

I am a purchasing agent for Union Carbide Corporation in New York City here.

Q How long have you held that position?

A About 12 years or something like that.

Q I would like to direct your attention to 1966, and I ask you if in or about that time you had occasion to enter into some negotiations with Mr. Jackson Leonard, seated here in court today.

A Yes, I did.

Q Would you describe in general what those negotiations related to?

A Yes.

The corporation decided, or determined that they needed new facilities for the production of a series of chemicals called alkylamines, and we determined that we were going to produce such at two locations in the United States, which were Taft, Louisiana, a facility we were building, and in South Charleston, West Virginia, at an existing plant.

My negotiations with Jack Leonard were concerned with the acquisition of technology in the field of alkylamines, which the Leonard organization offered for

sale, and in addition to the acquisition of the technological rights to the process technology, also the negotiations were concerned with the handling of what's called the detail design, which are making the various drawings and specs, the procurement aspects, which means you have to buy the equipment and materials, and for the facility, and the necessary responsibilities associated with start-up of the facility.

Q During the course of the early stages of that negotiation, did Mr. Leonard supply Union Carbide with a technical study in respect of the technology?

A Yes, indeed. Being a normal procedure for us, when we acquire outside technology, of course, to obtain what we call a feasibility type study, which sets forth the viability of the technology itself.

Q Did Union Carbide pay for that feasibility study?

A Yes.

Q Will you give us your best approximation of the amount that was paid?

A Yes. We had a purchase order, but I think it was, like, ten to $15,000.

Q During 1966?

A Yes, around mid-'66.

Q Did the negotiations culminate in an agreement

being entered into between Union Carbide and Mr. Leonard?

A Yes. Subsequent to that date we probably -- it was six to eight months of not only negotiations, but a lot of it was our own internal activity in determining that we wished to go ahead with the facility.

But the two activities took place on a concurrent basis. And I believe it was -- was it February of '67 -- or thereabouts, anyway, that we actually completed the negotiations, Jack Leonard and myself acting for our respective groups, to culminate in a contract.

Q I show you Government's Exhibit 3 for identification and ask you to examine it and tell the jury if you can identify it.

A Yes, it was February.

Yes, that is it.

Q Can you identify any handwriting on the last page thereof as being your own?

A Yes. That is what I just looked at.

Q Your signature.

A That's right.

Q Would you address your attention, please, to pages 9 and 12, and tell the jury if you can identify any entries on those pages as being placed on their by yourself?

A Oh, yes. The changes -- there are two on the page, one line above the other -- were made, I am sure, by the nature of them, at the actual contract signing, where a last minute adjustment was made rather than retype the page, et cetera, and was initialed by myself and Jack Leonard.

Q Will you look at page 12, please, and tell the jury what you can identify, if anything, on that page?

A Same thing applies.

MR. TIGUE: Excuse me, your Honor, may I just ask a question:

What it is he is identifying. I assume it is his initials or is it Mr. Leonard's as well?

Q Address yourself to the two sets of initials on the top of page 12, and tell us if you can identify either of those as being your own?

A Excuse me, the two you mean on page 9, maybe?

The two sets are at the top, right at the top of page 9.

Q Yes.

A Okay. Yes, those two -- the written change, where the cross-out and the printed change in the words are both my writing, no question, the initialing on the right side are my initials, and I guess I must recognize it, it's

Jack's, but, you know, I only saw it once, Jack's initials.

Q Turn to page 12, please, and identify the changes on that page by author.

A There are three changes on this page, and the same conditions apply. They are my writing, that is, the printing of it -- actually in this case there are additional words, there are no cross-outs, and the initials are mine.

Q Will you look, please, to page 6, and address your attention to the paragraph in sub-e, indicated on that page?

A 6 what? Excuse me.

Q Paragraph (e), on page 6.

A Yes.

Q And tell us if that paragraph, as it appears there, is the entire agreement in that spec between is and was, the agreement between Union Carbide and Mr. Leonard?

A Yes.

There is no change whatsoever?

Q Without change.

A Yes.

Q Following the execution of this contract in February 1967, were you charged with any responsibilities with regard to his administration?

A Generally, let's say implementation and adminis-

tration of a contract is taken over after I've executed it and kind of helped get things lined up with our Engineering Department, who then will implement the work in the design and constructing of the plant. This was done by a group from South Charleston, which is an engineering center of ours; the plant location of course being in Taft, Louisiana. This group does all the detail work, and what I do is from time to time associate myself with the contract and the contractors to ensure that, you know, work is being performed according to the contract, where our people are generally satisfied and that sort of thing.

And in addition, of course, if there is any problem, claim, or objection, or whatever there may be, that is associated with the contract, then of course, I am called in to work out a settlement of the matter.

Q Was there, with respect to the contract before you, any litigation between Union Carbide and Mr. Leonard or his assignee?

A Was there any litigation?

Q Yes, sir.

A Litigation meaning --

Q Whatever you understand that expression to mean.

A Well, I understand that to mean to lawyers are coming into create some kind of a case of some kind or a cause celebre and the answer to that is no.

Q I would like to draw your attention specifically to the late fall of 1967 and the first two months of 1968 and ask you if it is your best recollection that there was no litigation during that period and that to your knowledge none of the payments called for in the agreement were held up as a consequence of such litigation?

A Late '67, early '68?

Q Yes, sir.

A Let's see. Yes. That's when we were in mid-strea. That's correct, sir, there were none, to my knowledge.

Q What department of Union Carbide had the responsibility for phsyically preparing and making the payments under or pursuant to that agreement?

A Actually making the payment?

Q Yes, sir.

A The payment is made by -- I'm not sure I can give you the precise right name, but we have an accounting or an accounts payable department in the corporation, who receive let's say approved invoices of whatever type they may be and pursuant to the approval of an invoice and their production of a document, contract, like this, signed by somebody or a purchase order or whatever it may be, that gives them authority to make the payment and this is called an accounts payable group which at that time happened to be in our offices right in New York City for everything in the United States -- for all places in the United States.

Q If the accounts payable group had been ordered to hold up payment, would it have looked to you in your department to issue such an order?

A Well, it would have come around directly, or it would have bounced back to engineering, who would have come to me.

Q I neglected to ask you:

On the original date that the contract was signed by you and Mr. Leonard, will you tell the jury if additional copies were prepared at that time and if so, will you describe the additional copies?

A Yes. To the best of my recollection, we followed our standard procedure here -- it's rare that we don't -- in which we sign three copies.

A person like Jack Leonard and myself, whoever the principals might be. We execute three copies. One goes to the contractor, like Jack Leonard himself for his records. One is what's called the owner's record. That's the department I'm in, and our contract file.

The third one is called the owner's field copy. Usually they are stamped -- I notice this one is stamped here by the girl, and that goes to the location outside of New York who is handling the execution of the project. That's their document to work with, like in this case the Engineering Department out of South Charleston, and going to Taft.

That's their document to work with. We do make additional copies unsigned for the use of various people who have to work, to guide and help them.

MR. MAC DONALD: We offer Government's Exhibit 3 for identification.

MR. TIGUE: May I see that?

THE COURT: Yes. Absolutely.

(Pause.)

xx VOIR DIRE EXAMINATION

BY MR. TIGUE:

Q Mr. Mitchell, you and I have met, have we not?

A Yes.

Q I show you Government's Exhibit 3.

Could you tell me whose signatures appear on page 44, which is the last contractual page?

A Jackson D. Leonard, you mean, and H. R. Mitchell. That's me.

Q And there are some initials on the right?

A Well, that initial is in the printing . That's not an inked in initial, as you can readily observe. These things are typed up and on a master, right? And then, to explain what this is, that master, before I can execute a contract, I have to do one thing. I have to get some lawyer in the corporation to signify that he has seen it and reviewed it so we aren't doing anything that gives us a lawsuit.

Now, that initial is that of the lawyer, who happens to be Ray Murphy in this case.

Then when it comes down, then the girls make up copies from the master and that's why it shows up just as if it is part of the printing. Then the official ink signing would be as you see it here, between somebody like Jack

and myself.

Q Just one further question.

As I flip through the pages here, I notice that pages 24 and 25 have a different consistency than the other pages. Will you take a look and see if they are the original pages. Will you take a look at them, if you will.

A I agree with you. It does look like a different consistency.

Q Do you know why those pages are different than the others?

A I really couldn't tell you. I just don't know.

MR. TIGUE: I have no objection, your Honor.

THE COURT: All right. Received.

xx (Government's Exhibit 3 for identification, received in evidence.)

xx BY MR. MAC DONALD:

Q Mr. Mitchell, did there come a time when Government's Exhibit 3 was assigned with the consent of Union Carbide by Mr. Leonard?

A Would you say that again? This is 3, right?

Q Yes. Did there come a time when that contract was assigned by Mr. Leonard to another legal person or entity?

A Oh, yes. Some months after that -- I don't know,

maybe six months or something, after that -- Jack Leonard changed the corporate or partnership format of his organization from let's call it, from A to B, and that changed, which Jack requested us to agree to. After review by our lawyers, I did, and I am sure there's an amendment setting forth that change and really it's the name of the principal as far as we are concerned.

Q And some months after that occurrence, was there a termination of the contract and agreement expressing the parties' intentions with regard to termination?

A Yes, but that was kind of like quite a bit -- I don't know, a year or something, later, when the Taft job was done -- it was a fair period after the Taft job was done and the South Charleston job, which was the second plant, also got close to starting, but never really got off the ground, so we had to make an overall settlement and termination and it was done in the form of a termination.

It was only contractual mechanics to achieve ending everything we had.

Q Will you identify Government's Exhibit 65 in the various components for the jury, please, in the various components as the termination that you referred to?

A Yes, exactly. There is the thing -- the item you were referring to on 65. You have got a five stuck on

here.

Q That's from another time?

A Yes. '65, yes. That's the matter you talked about first there.

Q Yes.

A -- which was to change, the amendment that was made. This is the amendment. And Jack Leonard later requested that the amendment be made to the name of the company.

Q Are the two pages signed by yourself and Mr. Leonard expressing the assignments, and the third page is Mr. Leonard's letter to Union Carbide requesting such an expression of intention?

A Correct.

Q Will you address yourself now to the final two pages of that exhibit and tell us if you recognize that document?

A Now, let me see. That -- yes, this is -- this was the other and final amendment that was made to the contract, which is this one (indicating), which was done -- well, anyway, it was signed here -- it was December 1969, which was a fair period later.

Anyway, yes, this document was the final settlement that was done under the mechanics of termination of

this contract, because we had to settle out fees and other causes associated with the South Charleston plant -- it was a two-plant contract -- which we never really did get off the ground with. We played with it but it never really got started. So we had to settle various fees and causes that were associated with that, and in addition there were a number of claims made by Union Carbide with respect to some short-comings in technology that when we were running the plant weren't quite proper, and that was another term of the contract -- item in the contract that had to be resolved.

So the whole settlement was made at the end, and this is the document that we used.

Q That's a Xerox copy of an original?

A Yes.

MR. MAC DONALD: We offer Government's Exhibit 65 for identification.

THE COURT: Show it to Mr. Tigue, please.

MR. TIGUE: Just one question, if I may, your Honor.

XX VOIR DIRE EXAMINATION

BY MR. TIGUE:

Q On Government's Exhibit 65, page 2. I see there's an initial on the righthand side. Is that the

initials of your friend, the lawyer, approving it?

A Oh, yes. That's Mr. Murphy.

MR. TIGUE: I have no objection, your Honor.

xx (Government's Exhibit 65 for identification was received in evidence.)

MR. TIGUE: Thank you.

xx BY MR. MAC DONALD:

Q Mr. Mitchell, I have handed you a document which is marked Government's Exhibit 66 for identification, and I request that you please examine that document and tell the jury if you are able to identify it.

A Well, yes -- well, my identification has to be limited to the fact that it appears to me to be one of the number of copies that I mentioned before that were made, and which my friend, Mr. Murphy -- did he initial this?

Excuse me.

Yes. This was one of the numerous copies that, as I mentioned, that were made after I get a lawyer to look at it and he initials off to the side. I think this is all whited out. That's what it is.

Q This whiting out is what secretaries use to cover up errors?

A Yes. In fact, there's still some left on the side. Yes, you can see it through the back. It's there.

This is Murphy's initialing which indicates that it was one of the copies made at the time and we sent around as I said, a number of these unsigned ones for various people to use, and we take three of these and like Jack Leonard and myself, we execute the documents and they are stamped in as the official documents.

Q Will you address your attention, please, to page 6 of that exhibit and tell the jury if you can identify any of the alterations or insertions on that page?

A Well, obviously that's not mine, because I never cross out that way, the alteration, and I never initial anything this way in my life.

Q The H. R. H. on that page is not yours?

A Well, it's different from this, which is the original, and besides I don't initial this way.

Q Will you address yourself to pages 10 and 12 and tell us if you can identify the initialing on those pages?

A Yes. The same thing applies. Actually it's been crossed out in sort, I guess, and it's been typed up above, the changes in the original, which were done in my printing, and of course the initial on the side is just printed. It's not my initial.

Q Page 12, please.

A The same thing applies. The same thing. They're

all typed in rather than inked, and printed.

MR. TIGUE: I am sorry, your Honor. May I ask if the initial --

THE COURT: Why don't we have the answer read back.

Will you read the answer?

(Answer read.)

MR. MAC DONALD: Your Honor, the Government offers Exhibit 66 as an exhibit produced by Leonard Process Co. Inc. pursuant to a previous order and subpoena of this Court, in evidence.

THE COURT: Any objection?

MR. TIGUE: I have no objection, your Honor, but I do have an application to make at the side bar, if I might.

(At the side bar.)

MR. TIGUE: Your Honor will note that there are numerous holes on all these pages, in the initials and names. What the Government did is that they put about 200 holes in this document, small ones, for the testing process, and I don't want it to go into evidence without some comment, because this document is not in the same form it was when produced by Leonard Process.

I didn't want to go through a voir dire with him,

because he doesn't know anything about these things. But the signatures, as you can see, are somewhat mutilated.

MR. MAC DONALD: I don't know that we are really offering holes.

MR. TIGUE: That's the problem.

MR. MAC DONALD: Maybe we can make a statement for the jury's benefit, but we would like to think about that, and there's no need to pass that to the jury at the moment, and it can be received, I supposed, subject --

THE COURT: It can be received subject to some explanation --

MR. TIGUE: Well, I don't know if I can cross examine him under the circumstances. I object to it in its present condition because it's been altered, and I object if it's going in without some explanation. I don't want to stand on the principle that they have to prove the chain of custody, that this is the contract that was produced.

I don't want to put him to that proof, but I don't want the jury to speculate as to why these things are preforated, and I think marking the whole document -- If I need to I will ask him on the voir dire when he signed those with the holes in the paper.

THE COURT: Would you have any objection?

MR. MAC DONALD: No.

MR. TIGUE: And I would like a stipulation that when the document was produced there were no holes. It's not fair. We didn't put the holes in there.

MR. MAC DONALD: I think Mr. Tigue wants the jury to learn that there was some testing. The jury will learn that in an appropriate fashion.

Your Honor controls what exhibits the jury sees, anyway, and we ask that it be admitted subject to appropriate treatment of the holes. Or maybe by some further evidence --

MR. TIGUE: I would seek to establish the grounds --

MR. MAC DONALD: A witness can say he saw the holes put in at the lab. I don't know if we --

THE COURT: Will you be prepared to stipulate at the time that this was turned over to the Government that certain minute pinholes in the inking weren't there?

MR. MAC DONALD: Certainly. It's the truth, but I don't want to make a judgment about a stipulation at this stage of the offer. I can make a representation in good faith, but I want to reflect on the --

THE COURT: If you don't stipulate, I would think Mr. Tigue would be entitled to ask Mr. Mitchell when he saw it last and how it was --

MR. MAC DONALD: I have no objection.

I have one additional question or two of this witness, and I refer the Court to 3505A.

Once again, I represent in the same fashion that these notes are mine, and it is my custom to take substantially verbatim notes.

MR. TIGUE: I think it is going to become crucial when we get to the agents, but I don't consent to Mr. MacDonald's representation. It is not in Q and A form. If the witness says, "It was light green", and he writes down "light green," it's substantially verbatim, but not what court reporters do.

(In open court.)

xx VOIR DIRE EXAMINATION

BY MR. TIGUE:

Q Mr. Mitchell, will you look at Exhibit 66. There's some writing on pages 1, 6, 9 and 12. If you look closely, you will see there are innumerable pinholes in the signature.

A Yes.

Q Page 6?

A Yes.

Q Look at page 6. I think it is fair to say, if you look at the back, the scratch - out has innumerable

pinholes as do all the initials. And would you look at also pages 9 and 12.

A 9, yes.

Q On the last page, where the signatures appear.

A They aren't signatures. They are just initials.

Q Yes.

Would you look at those closely and see all those pinholes there?

A Yes.

Q Now, there is some writing on the last page which says "H. R. Mitchell."

Is that your handwriting?

A No, they didn't even spell my name right. They left out the final "L".

Q The initials "J. Leonard" aren't yours, obviously.

Do you know where the pinholes came on this copy?

A I haven't the faintest idea.

Q Were the pinholes there when the copies were executed and distributed at the closing?

A Well, this could have been a paper there copy to Joe or Max or something, but the rest of them, I haven't any idea.

Q I am referring to the pinholes.

A Yes.

Q Were they there when it was signed?

A Oh, no.

Q If you look at Government's Exhibit 3, there are no pinholes. Would you take a look.

A Yes, if you say so. Yes, it's not on the first page. That's for sure. I mean, I would not want -- right, okay.

MR. TIGUE: Well, in that case, your Honor, I would object to Government's Exhibit 66 with respect to the pages that have these pinholes in them.

THE COURT: It will be admitted into evidence with respect to everything except the holes.

(Government's Exhibit 66 for identification, received in evidence.)

BY MR. MAC DONALD:

Q Mr. Mitchell, I place before you Government's Exhibit 75 for identification, and I would like you to address yourself to the top of the two pages, the Xerox pages and not the yellow one.

Will you tell the jury if you are able to identify that document?

A Yes. It's a copy of a letter that Jack Leonard sent us, is that what you mean?

Q On or about the date that it bears?

A Dates April 24, 1968.

Q And with respect to the yellow carbon underneath that, are you able to identify that as having every seen it before?

A Well, it's the same letter, but it's apparently one of the carbons that are made.

MR. MAC DONALD: We offer Government's Exhibit 75 for identification.

MR. TIGUE: Is that a two-page exhibit, Mr. MacDonald?

MR. MAC DONALD: Yes. I will state for the Court that the second, yellow document, is a document produced by Leonard Process Company in response to the Court's order and subpoena.

MR. TIGUE: We have no objection to Government's Exhibit 75, your Honor.

THE COURT: It is received.

(Government's Exhibit 75 for identification, received in evidence.)

MR. MAC DONALD: I have no further questions of the witness.

MR. TIGUE: May I proceed, your Honor?

THE COURT: Yes, if you will.

MR. TIGUE: Mr. MacDonald, do you have Government's Exhibit 67, please.

xx CROSS EXAMINATION

BY MR. TIGUE:

Q Mr. Mitchell, you have known Jack Leonard for many years, haven't you?

A Well, I knew Jack starting probably, I would guess, late '65, just at the very beginning of '66, when we initiated these discussions.

Q And the background to Mr. Leonard and his company is that they design and do some preliminary operation for plants throughout the world, isn't that right?

A Yes.

Q And this would be throughout Europe?

A Yes.

Q Would you know if there are plants in the foreign countries, Japan, India, Mexico?

A Japan, yes, India, yes. I don't recall Mexico.

Q Holland, Italy, Rumania?

A Yes.

Q England, Spain?

A I don't recall those.

Q And in the United States did he design plants in Michigan, Indiana and Florida?

A I can't recall the precise locations, except there were two or three companies I know for sure that he did do plants for in the United States. I can't recall the plant locations, though.

Q And who would those companies be?

A Well, Carolina Chemical was one, I think. Maybe you might refresh my memory a little bit.

Q Were some of these your competitors, that is, Union Carbide competitors?

A Oh, I think you could say yes, because they were making the same product as us.

Q And when it came to building their plant in Taft, is it fair to say that Jack Leonard was the one man in the world who could perform it within the time you required?

A No. I think it's proper to say Jack Leonard offered us at a reasonable price the technology that he had developed, which we accepted and therefore could put to use immediately rather than to go into some more development of our own.

Q That would have taken some years to develop the technology?

A Oh, yes. Two, three or four years, something like that.

Q And Mr. Leonard was the only one who could

satisfy your need at that time?

A The only one that we could acquire from. The other people had it but wouldn't sell it to us.

Q And this plant in Taft was the biggest amines plant in the world, was it not, at that time?

A Yes.

Q Will you tell the ladies and gentlemen of the jury what amines really are, alkylamines?

A Well, Amines -- well, let's say they are just what we call an intermediate chemical that is produced, that is used in the manufacture of a variety of products, many of which actually we don't manufacture ourselves, so the product that comes out of an amines plant is a finished product as far as we are concerned, and it goes to various people. For example, it goes into insecticides. It's a base for the manufacture of insecticides, used in the agricultural industry, as an example.

We would sell that to people like Stouffer, whoever it might be, who then goes ahead and makes a finished insecticide and puts it in cans, et cetera.

There is a line of 50 differen products like this that use amines and the variation is that there are methyls, ethyls, tetra and penta amines, and it goes right up the line of organic chemicals, and they have different uses,

each one.

Q Is it used in pharmaceutical and rocket fuels and cosmetics and that kind of thing?

A Used, yes.

MR. TIGUE: Mr. MacDonald, may I have Government's Exhibit 67?

Q Mr. Mitchell, could you take a look at Government's Exhibit 67. Just take a look through it, including page 44, and tell us if you can identify that?

A Okay, I would identify it to the extent I believe I can properly, that's another copy, like I described before in one of those other exhibits, which is one that we make, that has typed in the changes that were initialed by myself and Jack in the original contract.

They are typed in but there's no initial. And it has a bunch of red pencil and ink markings and pencil markings from stem to stern.

Q It has the lawyer's initials on the back page as well?

A Yes. That's the best way to indicate it as one of the same group. A lot of them were run off.

MR. TIGUE: I would offer it as Government's Exhibit 67. We can use the same number.

MR. MAC DONALD: This likewise was produced by

Leonard Process Co.

That was done pursuant to this Court's order and subpoena.

xx (Government's Exhibit 67 for identification, received in evidence.)

THE COURT: We will take a short recess.

(Recess.)

Q Mr. Mithcell, do you have before you the three contracts, which I guess are Government's Exhibits 3, 66, and 67?

A Yes.

Q Now, let's see if I can get this straightened away.

Government's Exhibit 3 is the original contract signed by you and Jack Leonard, right?

A Yes.

Q And in the margin on that agreement and at the end appears your signature from time to time, pages 9, 12 and 44, is that correct?

A Oh, that's the signing. Yes, right.

Q So your handwriting is on that, that's the original, right?

A Yes.

Q Mr. Leonard's handwriting is there also?

A Yes.

Q Take a look at 66, please. Again referring to pages 6, 9, 12 and 44, it is true, is it not, Mr. Mitchell, that your handwriting does not appear on there anywhere?

A Yes, that's right.

Q You notice at the front it says "conformed copy", is that correct?

A It's inked in.

Q Right. That is the one with all the holes in it, right?

A Yes.

Q So that is not the original; Government's Exhibit 3 is the original. Right.

A Yes. One of the three originals.

Q Yes, right, one of the three originals.

Now, Government's Exhibit 67 is an additional copy, is that right?

A Yes.

Q Would you take a look in there and tell us if your handwriting appears on there anywhere?

A No place whatsoever.

Q Please go back to Government's Exhibit 66 for a minute.

MR. TIGUE: If I may, your Honor, I would like to read from page 6 of Government's Exhibit 66.

THE COURT: You may.

MR. TIGUE: Thank you.

Q This is the conformed copy. This is the copy, now, not the original. Do you have that before you?

A Page 6?

Q Yes.

A Go ahead.

MR. TIGUE: Paragraph 3 reads, members of the jury, "The amounts paid by the contractor under subcontracts for the work which have the approval required under 32 hereof."

Q Who was the contractor in this agreement, sir?

A The contractor is defined on the first page, Leonard, J. D. Leonard. Crossed out here then is "Plus a fee ten per cent", and the numbers are written and then a percent sign --"of paid amounts to cover contractors costs of processing and handling subcontracts for the work."

Now, there are initials in the margin and neither one of those are yours. Is that right?

A Correct.

Q And the other initials which also appear in this document are also not yours. Is that correct?

A Yes.

Q And the ones on page 9 and 12, for instance, while they are not your initials, they are provisions which you have agreed to?

A Yes.

Q Incidentally, Mr. Leonard is a licensed professional engineer, is he not?

A I believe so.

Q This plant was built where, in Taft, Louisiana, sir?

A Yes.

Q Take a look at Defendant's Exhibit B, if you would, and tell us if you can identify that, please.

A Well, I can identify the oyster shells that are in Louisiana?

Q I beg your pardon?

A I can identify all the oyster shells, which are in Louisiana. I presume this is supposed to be the armines plant. I couldn't just by looking at it. I think it is from the two columns and two reactors on it.

MR. TIGUE: I offer in evidence Defendant's Exhibit B for identification, your Honor.

MR.MAC DONALD: I will accept Mr. Tigue's representation if it is the armines plant. I have no objection.

MR. TIGUE: I so represent.

THE COURT: Received.

xx (Defendant's Exhibit B received in evidence.)

Q You said there were some egg shells -- some seashells in front there. What are they?

A They use that for road paving down there. It's cheaper.

Q May I see that?

A I just wanted to refresh my memory.

MR. TIGUE: May I pass this among the jury? I intend to continue, your Honor.

THE COURT: You may.

(Defendant's Exhibit B handed to the jury.)

Q Could you tell the ladies and gentlemen of the jury who Bill Shawver is?

S-h-a-w-v-e-r, I believe.

A Bill Shawver was the project manager appointed by the engineering group in Charleston -- South Charleston, for the alkylamines project, which was one of a series of such projects or units going into Taft.

Q You said that after you signed the contract, as a general proposition, it was turned over to engineering.

Would he be the person that Union Carbide had responsibility --

A To implement it, yes.

Q And is Mr. Shawver still employed by Union Carbide?

A Yes.

Q Where is he located, sir?

A South Charleston.

Q Is there a Mr. Ardsley? I may have that incorrectly spelled.

A Perhaps you mean Ashley.

Q Ashley. Who is Mr. Ashley?

A Ashley was what we called the general project manager for the entire Taft complex, and under him were a series of about six or eight project managers for each of the units, of which Shawver was one of the project managers.

Q And with respect to this contract, this was just one of many contracts which you negotiated and signed on behalf of Union Carbide?

A Yes.

Q Do you travel a great deal, Mr. Mitchell?

A Too much.

Q This 10 percent provision related to the detail design for the plant, did it not?

A Yes.

MR. TIGUE: I wonder if I might just briefly use the board, your Honor, to show something.

Q Union Carbide was the main control --

THE COURT: Mr. Tigue, I don't think it is appropriate, unless you are prepared to photograph the board and put in evidence what you put on it.

MR.TIGUE: Well, what I would propose to do, your Honor, is to put on the board, copy it, I mean hand-write it. I will make a photograph if your Honor rquires.

THE COURT: In some way it has got to become part of the record, otherwise it is not part of the record.

MR. TIGUE: Yes, I would certainly do that, your Honor.

THE COURT: Mr. MacDonald, let's take this one step at a time and I will hear from you when appropriate.

MR. MAC DONALD: Yes, sir.

THE COURT: Go ahead.

Q Mr. Mitchell, Union Carbide was the controlling factor here, were they not, of this plant at Taft and all the other plants that were there?

A I am not sure what you mean. They were our facilities. Is that what you mean?

Q Yes. And if you permit me I will abbreviate it "UCC".

Now, the plant at Taft had to be designed, is that correct?

A Yes.

Q Process design?

A Will you repeat it again? I have a little semantic problem.

Q Yes, the plant at Taft didn't exist and it had to be designed.

A Oh, right. It was just a sugar cane field.

Q And that was the job ov Jackson Leonard and his company, is that right?

A One piece of it.

Q We will get to that in a minute. But this particular plant, this alkylamine plant -- it is a-l-k-y-l, I believe -- was the job of Jackson Leonard to design that plant, is that correct?

A Correct.

Q And it was a contract between Union Carbide and Jackson Leonard. That is the one we have just been talking about?

A Yes.

Q If you permit me, I will put J. L. on there.

Now, the plant had to be constructed, did it not?

A Yes.

Q And that was the job of a corporation by the name of Peter Kiewit?

A Correct.

Q Will you spell --

A K-i-e-w-i-t.

Q -- it for the court reporter, please.

And it was a contract between Union Carbide and Kiewit, is that correct?

A Correct.

Q Now, Leonard's company was not sufficiently large enough or capable enough in numbers to do all the detail design, is that correct?

A Correct.

Q And it was actually at your suggestion or insistence that the work be subcontracted to another company. Correct?

A I think that's right.

Q And would that company be Treadwell?

A As it worked out, yes.

Q Excuse my handwriting, but that word does say "Treadwell." So there was a contract between Union Carbide and Leonard, and then there was a subcontract between Leonard and Treadwell, is that correct?

A Correct.

Q And under the terms of that agreement -- strike that.

The agreement between UCC and Leonard was for a fixed fee, is that correct?

A Plus certain expenses.

Q Yes. We will get to that. But there was a fixed fee in the contract, three quarters of a million dollars.

A That was an item of the cost, right?

Q Right. But he was to get a fixed fee for his

portion. We will get to the expenses in a minute. But there was a provision for $750,000, is that right?

A Yes.

Q And in connection with his responsibilities under that contract, he was the overall person responsible for all of the design, whether it's detail or process or whatever it was. Correct?

A Yes.

Q In connection with his relations with Treadwell, he was to receive, under the contract, 10 percent of whatever Treadwell charged, is that right?

A Yes.

Q And that provision was 100 percent legitimate, was it not?

A It was in the contract. That was the arrangement.

Q Yes.

Union Carbide signed the contract agreeing to pay Jack Leonard 10 percent, is that right?

A Excuse me if I might.

Q Sure.

A We agreed in the contract to pay him Treadwell's costs plus 10 percent.

Q Yes, right. That was right in the contract

when you signed it?

A Oh, yes.

Q The man in charge of Kiewit, at least at the -- let me withdraw it. In the whole complex there, this was one plant among a $300 million project?

A Correct.

Q And the plant was originally estimated to cost about $7 million?

A The alkylamines unit.

Q Right.

A Yes.

Q The others were a total of what, 300 million?

A Roughly.

Q Now, there was a man by the name of Frank Zemlan, who worked for Peter Kiewit, was there not?

A Yes.

Q And could you describe briefly what his responsibilities were?

A At what point?

Q Let's say back in the period '67 to '68. It is a while ago.

A Well, okay, you're in a transition point. Let's say during the time that the Leonard interests were active -- I will use that as the point in time, all right?

Q Please.

A --which would be '67 into '68, because he died about then, Zemlan was what was called the overall construction manager for Kiewit at the Taft site. He was responsible for the whole Kiewit interests at the Taft site.

Q And that would include all phases of construction, would it not?

A Which was all that they had was construction.

Q Right. And that would include obtaining the labor force to work on the various projects?

A Oh, yes.

Q And he would do that in conjunction with the Union Carbide people?

A He would do it under the guidance and supervision of the Union Carbide staff at the site, which consisted of Ashley that I mentioned, Shawver that we mentioned, and then there was in addition, a construction manager for Union Carbide for each one of these units as well. And so he was guided by them, if you wish.

Q The Kiewit people had responsibility for all of the plants sometime where, in 1968 or so, '67?

A Well, the agreement was start, I believe, early '68. No, wait, early '67, because I came in in mid-'66. Okay.

Q And during the course of the plant design and construction in this case, the Kiewit people were coordinated to some extent with the Leonard people, including Leonard; is that right?

A Yes.

Q And Mr. Zemland and Mr. Leonard: did they know each other?

A I am sure they did. It had to be --

Q Do you recall having introduced Mr. Leonard to Mr. Zemland?

A Specifically, no, but I would never say that I didn't.

Q Would you say it was either you or Mr. Ashley?

A Oh, yes. It had to be someone, either Ashley or myself. There is no reason why he wasn't introduced.

Q Now, with respect to the design, that would be the chemical, structural, electrical, mechanical design and drafting; is that right?

A That's right.

Q And it was Mr. Leonard's responsibility for all of the design work?

A Correct.

Q Even if Treadwell had subcontracted it, you gentlemen would have looked to Jack Leonard?

A Correct.

Q Now, in the terms of the contract, the Leonard Process Company had additional responsibilities to assist in the procurement of certain equipment, did they not?

A Yes.

Q And they also had some obligations, or they had the right to conduct on-site inspections as the plant was being constructed?

A Yes.

Q And from time to time Mr. Leonard went to Taft himself?

A He went to Taft on a number of occasions. I have no recollection of how many, but he did go.

Q And people who worked for his company went?

A He had a representative who probably went more than he did himself.

Q Would that be Mr. Lipsit?

A Well, it could have been Lipsit, but he left in the early stages of the job. And then there's a fellow, Dorsey, and maybe there was somebody else in between. I'm not sure. But anyway there were various people who fitted into the same job slot in Jack's organization as the project progressed.

Q And would you describe to the jury and his Honor,

please, the construction and inspection duties which he had either a right to do under the contract or an obligation to do?

A Well, they are what we call rights to perform, not obligations. When we buy technology, like we were in this case, part of the deal that they insist upon is that certain guarantees and warranties go with the technology that we are buying, and these are guarantees and warranties with respect to the -- that the technology not only works but it shows that if we built a plant just the way that it is set up, that it will make so many pounds of this material,and it will be the right quality, and the plant will work all right, and those sorts of things.

So when we have a break in the responsibility of the party doing the construction, Kiewit, which was not Leonard's responsibility, but Leonard has a responsibility to assist us in the start-up of the plant and to be there when we make test runs to demonstrate that these guarantees and warranties have been met.

We find we always have great problems if we exclude the other party from being able to observe or inspect or check the construction that's being done, although he is not directly responsible for it, but there are many latent conditions that could occur that aren't visible to the eye. So

we allow the contractor -- in this case, the Jack Leonard organization -- to visit from time to time, to observe the work that's being done by, in this case, the Kiewit and the Union Carbide interests down at the job site.

Now, call that whatever words you wish. We just call it inspection rights.

Q In other words, Mr. Leonard would not be in a position after something went wrong to say, "Well, he didn't build it the way I said", and so forth.

A We tried to obviate that.

Q And under the contract, was he obligated to perform some start-up services?

A Oh, yes. He provided what we call start-up assistance. We do not ever allow a contractor to tape people in his own hand and start up a plant, because if they ruin the equipment for any reason, there's no responsibility on their part to replace it. So therefore -- At least, I have never been able to get one to take it on.

So therefore we take the responsibility on starting the plant, but we have the contractor's what we call start-up assistance people working with us, right next to us, as a team, you might say, and that was the in-put that the Leonard organization made.

Q Now, who are the people at Treadwell whom the Union

Carbide people dealt with?

A Excuse me?

Q Who were the Treadwell people involved in the design? Who was in control of the Treadwell function?

A Well, I think -- wasn't it Rogacki? Stan Rogacki, who was the project manager. Maybe his recollection is better than mine.

Q Would you spell that name for the reporter.

A R-o-g-a-c-k-i, I think is close. His first name was Stan. Rogacki I believe his name is.

Q Now, the contract envisioned the design of not one but two plants; is that right?

A Yes.

Q And one plant was to be located in Taft, Louisiana?

A Yes.

Q That was actually built?

A Yes.

Q And it was originally envisioned that there would be a second plant, in South Charleston, Virginia?

A West Virginia.

Q And that plant was never built; correct?

A That's right.

Q In connection with that plant, under the terms of the agreement, the Leonard Company had a right to ten per cent

override? That is the ten per cent referred to there. They had a ten per cent override for whatever design work was to be done at that plant as well?

A This is the South Charleston plant?

Q Yes.

A That's right.

Q Let me see if I can find that letter. You can take a look at the original.

MR. TIGUE: This is Government's Exhibit 75, which the Government introduced in evidence.

I have copies, your Honor. May I distribute these to the jury? It is in evidence

MR. MacDONALD: Yes; it is, your Honor.

Q Now, I think we all have copies before us, Mr. Mitchell, of this letter. This was a letter which you received from Mr. Leonard back in April of 1968; is that right?

A Yes.

Q And it was some time thereabouts, some time after this letter, that it was decided by Union Carbide that the second plant at South Charleston, would not be built; is that right?

A Yes.

MR. MacDONALD: I missed the last two words of the witness' answer.

THE WITNESS: No; it was just a "yes". I am trying to get my time points.

Q And this letter refers, really, to how the ten per cent override would have been paid to the Leonard Process Company had that gone through; is that right?

A Not exactly. If I might explain --

Q Please do.

A Because I think we have missed perhaps a key point or element here.

If the plant, the South Charleston plant, had gone through as it was originally planned, the conditions would have been exactly the same as they were for the Taft plant, with Treadwell doing the design, being reimbursed and getting an additional ten per cent, just the way the contract reads.

Q Yes.

A Now, when we did not proceed at the particular time that we had anticipated with the South Charleston plant, starting the design in Jack Leonard's office, and it started to drag on because of marketing problems, we started to take what we call a bit of a tilt in the way we were going to handle the job. So what happened was, our South Charleston engineering department, which is a couple of thousand engineers down there, were kind of running out of work, shall we say, to do, so as is the usual practice, we seek out where we

have been engaging outside services that we could undertake ourselves.

So this letter came as a result of some of the thinking -- it was at that time only thinking -- that we, number one, were not sure about proceeding, and, number two, even if we do proceed, we will not want to have the Leonard organization using Treadwell or anyone else doing detailed engineering services, because we wished to do them in house.

So that would have required a change in the contract and a change in the way we were going to do our work.

Q In short, the UCC people were running out of work, and you would have preferred to have them do it rather than Treadwell; is that correct?

A That's correct.

Q And when that thinking was communicated to Mr. Leonard, he attempted to bring about an alternate means of getting his rights under the contract; is that right?

A I think you could say that.

Q And that really is Government's Exhibit 75, which we all have before us?

A Yes.

Q And the whole proposal went down the drain, so to speak, because South Charleston was never designed or built?

A Correct.

Q Now, up until this plant was designed and built, the amines plant at Taft, Union Carbide had some difficulty with the prior eight or nine plants that they had built?

A What kind of difficulty do you mean?

Q They were all late, weren't they?

A Yes.

Q They were all cost-overrun, were then not?

A Probably all, I would say, yes.

Q And would you agree with the statement that, by and large, this plant was the most successfully constructed with respect to its being on time and it was within budget?

A I think the record would show that, yes.

Q Now, in your direct examination, Mr. MacDonald asked you about whether or not there was any litigation in connection with this contract; is that correct?

A Yes.

Q And I believe -- if I got the words correctly -- you said, "What do you mean by litigation? Is that where lawyers come in and make a cause celebre?"

A Yes.

Q in 1969 didn't this contract come to the brink of a lawsuit, the final payments?

A It's a matter, perhaps, of a few words. Let me explain. We are talking at the very end?

Q Yes.

A The end of '69.

Q That's when it was settled?

A Yes.

Q When did the dispute begin?

A Oh, probably early -- probably the beginning of ;69, I suppose, we could say, or mid-'69. I just can't recall the time. But let's say certainly by mid-'69. It was settled in December, because that's when the settlement agreement was made. I would say five or six months, maybe even longer than that. Maybe nine or ten months. But it was the better part of that year.

Now, at that time, the only time to my recollection that there were ever, let's say, thoughts thrown at me or our organization that I had knowledge of was probably only a few weeks before that settlement, where we were at the last stage of the usual sorts of things of, you know, our claim is here and the other number is here and we were trying to get a resolvement, and Jack did indicate to me at about that time that he was going to have to get his lawyer into it to do something about it, with Union Carbide -- he had to protect whatever he thought his rights were. But that was all that was said. I never saw the lawyer or heard from him or anything else.

So I considered that to be just a normal negotiation threat. We do the same, so there's nothing unique about it.

Q Do you recall in November of 1969 that Mr. Leonard's lawyer sent a letter to Union Carbide saying, "If we don't settle our differences or if you don't pay what is claimed, we intend to bring suit"?

A If there was, I have no recollection of it.

Q Would you take a look at Defendant's Exhibit C for identification and tell us if it refreshes your recollection as to whether or not there was some correspondence with the lawyers, your lawyers and Mr. Leonard's lawyers?

THE COURT: While Mr. Mitchell is looking at that, will counsel come up to the side bar.

(At the side bar:)

THE COURT: Mr. MacDonald, 3505-A, you say, is similarly not producible --

MR. MacDONALD: I am the author of that entire exhibit, and it was never shown to Mr. Mitc hell, never signed or read by him or in substance ever adopted by him, and that takes it out of Number 1. If it is Number 3, it has to be because of the accuracy of the person making the statement, and I say that I am not a person who is a substantially verbatim note taker. It is in the first person, but when I do a Q and A sheet -- I should tell the Court first of all that

on the last page there is also an interview from last summer. The next-to-the-last page had to do, I think, with my having interviewed the witness about two weeks ago, and these are reminders to myself to ask him certain questions. The three top pages were what I wrote in the last couple of days when I outlined my direct examination. I must confess that I made some changes, and I didn't follow it precisely.

At no time did I attempt to set forth Mr. Mitchell's words substantially verbatim.

THE COURT: He has testified substantially in the form that I read your notes.

MR. MacDONALD: I am happy that that occurred.

THE COURT: That, obviously, it seems to me, plops it into 3500(a)(2), and, frankly, I was going to call it to Mr. Tigue's attention, because I was looking through it during the morning recess -- I was going to call it to your attention before he got off the stand, and the reason for this side bar is that I want to tell you, I don't find from reading it any conflicting material here, but there are extensive notes on the subject of this litigation subject matter, which, it seems to me, Mr. Tigue is entitled to.

MR. MacDONALD: Judge, I really think the identity of the witness' testimony with my notes, while it is one factor you might consider in concluding whether this meets the

test of Sub-section 2 --

THE COURT: It is something recorded which is a substantially verbatim recording of the statement made by the witness.

MR. MacDONALD: I told the Court --

THE COURT: You talked to him about the litigation?

MR. MacDONALD: Of course.

MR. TIGUE: Your Honor, this question of litigation is of some importance, because one of the Government witnesses will say that Leonard said there was some litigation in 1967, and the Government will attempt to show that Mr. Leonard lied when he spoke with the agent. So this is a matter of some substantial importance.

THE COURT: Mr. MacDonald, I really think -- for instance, this paragraph on page 2 in 3505-A: "I am unaware of any litigation between UCC and JDL-LP Co., Inc. as to this contract.

MR. MacDONALD: If I may refresh your Honor's recollection, the witness answered, "What do you mean by litigation?" And I sayd, "Whatever that term means to you." The witness then said, "If it means" -- Well, your Honor is familiar with his answer. His answer is far more extensive than the bare negative which I had hoped to elicit.

THE COURT: It still is a statement which is virtual-

ly what he said, that he wasn't aware of any.

MR. TIGUE: That is my point. Mr. MacDonald doesn't take notes from A to Z, but all note takers take some verbatim notes, although they may not be as verbatim as the notes my friend here takes.

MR. MacDONALD: I had hoped we could resolve it with a more extensive statement with respect to the --

THE COURT: Well, suppose we recess to a quarter of two. Could you get me those cases, so I can go over them during the lunch hour?

As to the young lady who was here earlier, I didn't see anything here that amounted to a hill of beans.

MR. TIGUE: My big eyes tell me there is very little there.

THE COURT: I don't feel that that comes within 3500 in any way, shape or form.

Looking at the one with regard to Mr. Mitchell, I have a feeling -- let's put it this way: if you had not told me these were not verbatim notes, I would conclude that it was a very good summary statement of what the man was saying to you.

MR. MacDONALD: It was fully intended to be a verbatim transcript of what he would testify to. There were a lot of inputs of information, and I will explain those to

your Honor.

THE COURT: It's in the first person.

MR. MacDONALD: I also have another request of the Court --

THE COURT: Suppose I let the jury go.

(In open court:)

THE COURT: Ladies and gentlemen, we will stand in recess for lunch until a quarter to two, and if you will give the Clerk the exhibits which you have, they will be preserved for your future use.

And don't speak with each other or anyone else about the case while you are lunch or any other time.

Mr. Mitchell, you may step down until we resume.

(The jury and the witness left the courtroom.)

THE COURT: Mr. MacDonald, I suggest you look at 3505-A yourself. Do you have a copy?

MR. MacDONALD: Yes; I have the original.

THE COURT: Look at it. I fully credit the fact that, as you say, you did not write down exactly what he said, but I am troubled by the fact that what he has been saying is so close to what is in the language, that you have been putting down the substance virtually of what he was telling you, whether you did it in his words or in general judicial parlance. So reading your synthesis and your testimony --

MR. MacDONALD: Well, it doesn't make it 3500.

MR. TIGUE: Your Honor, I would request that you instruct the witness not to speak to anyone connected with the Government until I have concluded by cross-examination.

THE COURT: Mr. Mitchell, you are permitted to talk with anybody you want to about any subject whatsoever except what you are here testifying about or anything connected with this case. You can discuss the Super Bowl or your family or anything else.

THE WITNESS: Thank you. What I am saying is concerned with other matters.

THE COURT: I understand.

(A luncheon recess was taken.)

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